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OUTLINE
OF THE
LAW OF SALES

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PREFACE

This book is an attempt to explain the New York statutes relating to the Sale of Personal Property and the theories, reasons, and doctrines on which they are based. In connection with the various statutory provisions, there are discussed leading English and American cases in the development of the Law of Sales, and several New York cases showing the interpretation and construction placed upon the statutes by New York Courts.

Wherever possible, the writer has expressed the views of that eminent authority and draftsman of the Uniform Sales Act, Professor Samuel Williston of Harvard Law School, in order that the student may understand the background of the statute in its present form.

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OUTLINE OF SALES

CHAPTER I.

INTRODUCTORY.

§ 1. **Foreword.** The law of sales is now very largely statutory. It was codified in England in 1893 under a statute known as the Sale of Goods Act. In the United States considerable differences developed between the law of sales as applied at common law in the different states. This diversity had become so marked and confusing that in 1906 the Commissioners for the Promotion of Uniformity of Legislation in the United States adopted what is known as the Uniform Sales Act, which was based largely on the English Statute. This Act has been adopted, with some changes, by the legislatures of most of the American States. In the year of 1911 the legislature of New York adopted the Uniform Sales Act with very few changes (Laws of 1911, chap. 571). The Act thus adopted is to be found in Secs. 82-158, inclusive, of the Pers. Prop. Law.

§ 2. **Sale Distinguished From Gift.** A gift is distinguished from a sale in that no exchange in return for the property transferred is bargained for. In both sale and gift there is a transfer of property. Delivery is necessary to the validity of a gift. Noble vs. Smith, 2 Johns. 52; but is not necessary to the validity of a sale. Title may pass by gift but only when delivery is made. Title may pass by sale prior to delivery.

A giver can never give a better title than he himself had. But a sale may in many cases pass a better title than the seller himself had.

Warranties are implied in a sale, but not in a gift.

§ 3. **Sale Distinguished from Bailment.** It often becomes important to determine whether a transaction is a bailment or a sale. If it is a sale, the buyer must pay the price, even if the goods are lost, damaged, or destroyed; but if it is a bailment, the bailor and not the bailee must stand the loss, unless it was due to the negligence of the bailee.

A bailment contemplates a transfer of possession but not of ownership. A sale, on the other hand, contemplates a transfer of ownership, with or without a transfer of possession.

In a bailment there is a duty to return the property bailed or otherwise to dispose of it, in accordance with the directions of the bailor. In a sale there is no duty to return the article, but, instead, a duty to pay for it.

When grain is delivered to a warehouse or elevator and it is not contemplated by the contract that the warehouseman or elevator company shall return the identical grain deposited, and by usage or custom may return an equal amount of grain of the same kind and grade, the transaction, according to the weight of authority, is a bailment and not a sale, even though the identity of the mass in the warehouse or elevator is continually changing, by being added to and taken from, as long as it remains sufficient to meet all outstanding receipts, *Andrews vs. Richmond*, 34 Hun. 20. But if the warehouseman allows the quantity on hand to become insufficient to meet all outstanding receipts, or is given the option of returning a like quantity or quality, or of paying the market price in lieu thereof, the transaction is a sale and not a bailment. *Bretz vs. Diehle*, 117 Pa. St., 589; *Cloke vs. Shafroth*, 137 Ill. 393.

§ 4. **Cases Illustrating Distinction Between Sale and Bailment.** In *Norton vs. Woodruff*, 2 N. Y. 153, the defendant, who owned a flouring and custom mill, contracted to "take" the wheat of the plaintiffs, which was to be of good merchantable quality, and to "give" them one barrel of superfine flour, at his mill, for every four bushels and fifty-six pounds of their wheat so delivered. It was held that, as there was nothing in the contract that expressly or by implication obliged the defendant to deliver to the plaintiffs flour manufactured from the plaintiffs' wheat, the contract was one of sale, not of bailment. The Court said: "The agreement upon his part was satisfied by the delivery of a barrel of first rate superfine flour for every four bushels and fifty-six pounds of wheat received by him, whether manufactured at his mill or elsewhere, obtained by purchase or otherwise. This is a controlling circumstance to show that the parties intended a sale or exchange and not a bailment."

In *Mack vs. Snell*, 140 N. Y. 193, the parties entered into a contract, by the terms of which the plaintiffs agreed to manufacture for the defendant 1,000 pairs of pruning shears,

to be in all respects like a sample furnished; the defendant to furnish the rough castings for the handles, etc., and the plaintiffs the blades. The plaintiffs delivered and the defendant received a portion of the shears, but on discovering that they did not conform to the sample, refused to pay for them, or to receive or pay for the balance. The plaintiffs claimed that as this was a sale of shears, the defendant was bound to pay for all, having received and accepted a part of them. But it was held that the transaction was a bailment and that principles of the law of sales did not apply. Where by the terms of the contract, B is to manufacture and deliver to A finished products made in greater part out of raw materials furnished by A and in lesser part out of raw materials furnished by B, the transaction is a bailment and not a sale. *note*

In *Ackerman vs. Berkowitz*, 206 N. Y. S. 624, the plaintiff, a dealer in dresses, sold goods to defendants, who were manufacturers, at a fixed price, with the understanding that the defendants should make the goods into dresses and sell the dresses back to the plaintiff at an increased price, the difference in price being the compensation for defendants' labor. It was held that this was a bailment and not a sale.

In *Graber vs. Rubin*, 181 N. Y. S. 71, 110 Misc. 108, the plaintiffs, who were contractors, received material from the defendant jobbers to be made up into dresses. Under the contract, the material was charged to the contractors, who, after the manufacture, were to charge a stipulated price for each dress, consisting of the price of the material plus cost of labor and extra material furnished by the contractors. It was understood that the contractors should send the waists of the dresses, after they had made them up, to an embroiderer for embroidery work. The embroiderer was an independent contractor. While the goods were in the hands of the embroiderer, they were accidentally destroyed by fire. It was held this was a contract of bailment. The contractors were entitled to recover the cost of the material which had been charged to them, and also the cost of their labor.

Where raw materials are delivered by one person to another under an agreement that when manufactured or improved by his skill and labor, the property is to be divided or sold and the proceeds divided or returned to the bailor after allowing a commission to the bailee for selling it, the transaction constitutes a bailment and not a sale. *Sattler vs. Hallock*, 160 N. Y. 291; *Stewart vs. Stone*, 127 N. Y. 500.

In *Westcott vs. Thompson and Atkinson*, 18 N. Y. 363, a brewer sold and delivered sixty-seven barrels of ale, bearing his brand, to a retailer, upon the agreement that the barrels should be returned after the ale was drawn, but if any were not returned he should pay \$2 a piece for them. It was held that the property in the barrels remained in the seller, and that the specification of their value operated not to give an election to the buyer to retain them at that price, but to fix the damages in respect to such as he should be unable to return.

§ 5. **Chattel Mortgage Distinguished from Sale.** In a sale the parties generally contemplate an absolute indefeasible transfer of title. But in a chattel mortgage, although the title is transferred at once to the mortgagee, it is subject to be defeated by the payment of the sum it was given to secure. The mortgagee's title becomes absolute only upon default of payment of the loan by the mortgagor, the mortgagor in the meantime having the equity of redemption. *Parshall vs. Eggert*, 54 N. Y. 18, 23.

Sometimes one who borrows money from another gives him as security a bill of sale of certain personal property. If the bill of sale, otherwise absolute upon its face, contains a provision that the property shall remain in the possession of the vendor for a certain period of time, and if during that period the indebtedness shall be paid, the conveyance shall be null and void, the instrument will be treated as a chattel mortgage. *Blake vs. Corbett*, 120 N. Y. 327; *Smith vs. Beattie*, 31 N. Y. 542. And where the bill of sale, otherwise absolute upon its face, contains a provision that if the buyer pays to the seller the amount of the loan within a certain time, the seller will "resell" the property to the buyer, it is in effect a chattel mortgage, and the fact that it employed the term "resell" will not change its meaning, when no other sum than the amount of the loan is mentioned or contemplated as the price of such resale. *Susman vs. Whyard*, 149 N. Y. 127.

§ 6. **Sale Distinguished from Barter or Exchange.** Economists have sometimes distinguished between sale, on the one hand, and barter or exchange, on the other, by the medium of payment. If it is money, they call it a sale, but if it is other goods or property, they call it a barter or exchange. But both at common law and under the Sales Act, the same principles of law that govern sales govern barters and exchanges. Subd. 2, Sec. 90, Pers. Prop. Law,

expressly includes exchanges within the purview of the Sales Act by providing that "The price may be made payable in any personal property."

The Statute of Frauds applies to contracts of barter and exchange, as well as to contracts strictly for the sale of goods. *Raymond vs. Colton* (1900), 104 Fed. 219; *Bennett vs. Hull* (1813), 10 Johns. 364; *Walrath vs. Ingles* (1869), 64 Barb. 265.

§ 7. Distinction Between "Sale" and "Contract to Sell."

Every sale must arise out of a contract to sell, but not every contract to sell is a sale. The distinction between the two is drawn as follows in Sec. 82, Pers. Prop. Law:

"1. A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

"2. A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price."

If the seller assents to title passing to the buyer at the time the bargain is made, the transaction is a sale, but if in the bargain the seller agrees to title passing to the buyer at some future time, or upon the happening of a certain event or condition, then the transaction is only a contract to sell.

It is important to bear this distinction in mind, for if it is a sale, title and risk of loss has passed to the buyer and the buyer may sue the seller for conversion, if he fails to deliver the goods. But if it merely is a contract to sell, title and risk of loss remain in the seller (Sec. 103, Pers. Prop. Law), and if he fails to carry out the contract, the buyer's remedy will generally be only an action for breach of contract.

§ 8. Cash Sales. Where a seller refuses to sell except for cash, it may mean (1) that he refuses to part with the possession of the goods until the price is paid, but does not decline to transfer title; or (2) that he declines to transfer title, but does transfer possession; or (3) that he declines to transfer either title or possession until he is paid. Although all three of these cases are sometimes called cash sales, it is more proper to speak only of the third case as a *cash sale*, since the first is a sale with a lien on the goods for the price and the second is more accurately spoken of as a conditional sale. Williston on Sales, Sec. 341.

Ordinarily, if there is no agreement as to credit, the

presumption is that delivery and payment are to be simultaneous, and that it is a cash sale. Where a contract of sale fixes no time for payment, the law presumes that payment is to be made on delivery. This presumption has been made a rule of law by Sec. 123, Pers. Prop. Law, which reads: "Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods."

If, under an agreement for a cash sale, the seller delivers the goods to the buyer or permits the buyer to take delivery, without demanding and receiving payment, the seller waives the condition concurrent and the transaction becomes in fact a credit sale. However, it has been held that the mere handing over the goods to the buyer, or temporarily leaving them in his possession with the expectation of immediate payment does not constitute an absolute delivery and is not a waiver of the concurrent condition of payment, Levin vs. Smith, 1 Denio (N. Y.), 571.

§ 9. **Conditional Sales.** As in every other kind of contract, so in a contract to sell, there may be inserted such conditions as the parties agree upon. The typical case of conditional sale is a sale in which the transfer of title is conditional upon the payment of the price. Though sales upon other conditions may readily be imagined, the practice of selling goods with a retention of title until payment of the price is so common that the ordinary meaning of the term "conditional sale" is confined to sales upon this particular condition. Williston on Sales, Sec. 7. Sub'd 3, Sec. 82, Pers. Prop. Law, in providing "A contract to sell or a sale may be absolute or conditional," expressly includes within the Sales Act transactions commonly referred to as "conditional sales," as distinguished from sales in which there are conditions expressed or implied, which are covered by Sec. 92, Pers. Prop. Law.

§ 10. **Auction Sales.** The auctioneer in putting up articles for sale is inviting offers, rather than himself making an offer. Each bid is an offer and the acceptance is the knocking down of the hammer on a particular bid. It follows that the bidder may retract the bid or the auctioneer withdraw the goods from sale at any time before the hammer falls, for until then the contract is incomplete. Payne vs.

Cave, 3 T. R. 148. If the article is sold for a price of fifty dollars or more, it has been held that between the fall of the hammer and the writing of the memorandum required by the Statute of Frauds, not only may the bidder withdraw (Williston on Sales, Sec. 115), but the owner of the property may revoke the auctioneer's authority, Byrne vs. Fremont Realty Co., 120 App. Div. 692. Subject to the exceptions just stated, title passes to the purchaser as soon as the hammer falls, notwithstanding the condition implied in every sale by auction that delivery is to be made only upon payment of cash. Such a condition does not have the effect of making the transaction a cash sale, in the strict sense of that term, so that title would not pass until cash is paid on delivery. Such a condition is construed as meaning that possession shall be retained until payment, although title passes at the time the hammer falls. Williston on Sales, Sec. 296. *not*

The auctioneer is personally liable to the buyer unless, prior to the sales, he disclosed the principal for whom he was acting. Meyer vs. Redmond, 205 N. Y. 478, aff'g 141 App. Div. 123. If the purchaser fails to take and pay for the goods after the sale has become binding on him, the property may be resold at his risk.

Sometimes the auctioneer promises to sell without reserve, i.e. agrees in advance to sell to the highest bidder, even if the highest bid is not satisfactory. Where the auction is advertised as being without reserve, the auctioneer cannot withdraw the article nor can a bidder retract his bid, after the bidding has commenced. Sub'd 2, Sec. 102, Pers. Prop. Law. *note*

Prior to the bidding on any article, the auctioneer may withdraw it from sale, and after bidding has begun on a particular article, the auctioneer may withdraw the rest of the goods from sale, even though the sale had been advertised to take place without reserve. Williston on Sale, Sec. 298. *Here*

Unless the advertisement or announcement of the sale reserves to the seller or to his agent the right to bid, the sale may be avoided by a highest bidder to whom the goods have been knocked down, if a puffer was employed by the seller or auctioneer to raise the bidding on that article. Sub'd 3, Sec. 102, Pers. Prop. Law. The auctioneer may not himself bid, or as agent for a bidder other than the seller or his agent, because of the inconsistency of the position of selling as auctioneer and acting as buyer.

CHAPTER II.

SUBJECT-MATTER OF SALE.

§ 11. **In General.** A seller can transfer ownership only to such goods as are in existence and which he then owns. But he can agree to transfer at some future time the ownership of goods not now in existence or which he does not now own. The law never forbids any contract to sell merely because the seller does not own the goods which are the subject of the bargain. Such contracts are very common—e.g. a contract by a manufacturer for the sale of his future product, or contracts to sell grain or cotton which the seller does not own at the time. Pers. Prop. Law, Sec. 86, recognizes this practice of the commercial world by declaring:—

“1. The goods which form the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract to sell, in this article called ‘future goods’.

“2. There may be a contract to sell goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.”

§ 12. **Future Goods—Doctrine of Potential Possession.** At common law a seller might transfer title to goods which he did not then own or which were not then in existence. If a farmer contracted to sell all the corn that shall grow upon his farm for the next five years, title to such corn passed to the buyer at the time of the bargain, on the theory that the corn was *potentially* in existence when the farmer made the bargain, because the land out of which the corn was to grow was in existence and owned by him, and what was potentially in existence he could sell and pass title to at once, although it was not yet in actual existence. This was known as the Doctrine of Potential Possession. The leading case under this doctrine is *Grantham vs. Hawley*, Hob. 132 (1616), although the doctrine was nearly two hundred years older. According to that doctrine, a man could sell and pass title at the time of the bargain to all the wool that would grow upon his sheep for any number of years in the future.

§ 13. **Future Goods—Rule Under the Sales Act.** Under the Doctrine of Potential Possession, the buyer would get title to the wool from the time of the bargain, even if the seller later, but before the wool grew, sold the sheep to a purchaser for value without notice. The buyer of the wool would be protected at the expense of the subsequent buyer of the sheep. This worked a hardship on innocent purchasers for value, because, since sales did not need to be recorded, there was no way for a subsequent purchaser of the sheep to learn of the previous sale of the wool to be grown on them.

Therefore, the Sales Act abolished the Doctrine of Potential Possession, so that now the buyer of future crops or wool to be thereafter grown does not get title from the time of the bargain but only a contract right to the crops or wool. Pers. Prop. Law, Sec. 86, Sub'd 3, provides: "Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods."

This view accords with that of reason and common sense. It is obvious that it is impossible for a seller to transfer title to goods of which he has neither ownership nor possession at the time of the sale. As he has no title, he can give none, though he can make a contract to sell such goods. Though the parties purported to make a sale, if their intention cannot be effectuated fully, they are held at least to have made a contract. Hence today the legal effect of a contract to sell after-acquired property is that the buyer merely gets a contract right against the seller. He does not get title at the time of the bargain.

§ 14. **Equitable Effect of Contract to Sell Future Goods.** When parties contract to buy and sell land, an equitable interest in the land at once passes to the buyer. And where the parties have agreed to mortgage personal property subsequently to be acquired, it has been held that the mere agreement to mortgage gives the mortgagee an equitable lien upon the property, as soon as it is acquired, good as against the mortgagor's trustee in bankruptcy or attaching creditors or any one else who is not a purchaser for value without notice. *Holroyd vs. Marshall*, 10 H.L.C. 191 (1861).

By analogy, it has sometimes been urged that a contract to sell after-acquired property gives the buyer an equitable interest in the goods which should prevail against the trustee in bankruptcy or attaching creditors of the seller. The buyer's equitable interest in a land contract is based on the buyer's right to specific performance. And in an agreement

to give a mortgage, equity may grant specific performance, because damages are not an adequate remedy for a promise to give security. But inasmuch as damages are ordinarily an adequate remedy for breach of a contract to sell goods, equity will not generally grant specific performance of a contract for the sale of ordinary personal property. Therefore, if any equitable interest passes by virtue of an agreement to sell future goods, it cannot be based on the right to specific performance, for there is no such right.

It is possible to conceive of cases where money damages would be an inadequate remedy for breach of a contract to sell future goods, as where the buyer paid the purchase price at the time of the bargain and the seller has since become bankrupt. In England there have been two decisions giving the buyer in such a case an equitable lien on the goods for the restoration of the price. *Langton vs. Waring*, 18 C. B. (N. S.) 315; *Young vs. Matthews*, L. R. 2 C. P. 127. It is true that if the seller becomes bankrupt, his estate has both the goods when they come into existence or into his ownership and the price for them, but every creditor of a bankrupt estate has parted with his money in return for a promise which has not been kept, and if an equitable lien were allowed on the bankrupt's property for a restoration of the price paid for future goods, it would amount to a preference which is forbidden under the Bankruptcy Law. "For a court to decree specific performance of such a contract because of insolvency is not only a violation of the maxim that equality is equity but is nothing less than ordering the debtor to do something which the Bankruptcy Statute has forbidden him to do." *Williston on Sales*, Sec. 144.

In New York the Court of Appeals decided in 1894 in the case of *Rochester Distilling Co. vs. Rasey*, 142 N. Y. 570, that an agreement to mortgage future-acquired property gave an equitable interest to the mortgagee; and the language of the Court in that case seems to indicate that it would have taken the same view, if there had been a sale of after-acquired property instead of a mortgage. For other New York cases allowing the present sale of crops having only a potential existence to create an interest in the crops when they mature, free from all equities arising since the sale, see *Andrew vs. Newcomb*, 32 N. Y. 417; *Fleetham vs. Reddick*, 82 Hun. 390. But it should be observed that those cases were decided before the Sales Act was adopted in New York. Since the Sales Act abolished the distinction

between goods having a potential existence and other future goods, and declared that "where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods" (Sub'd 3, Sec. 86. Pers. Prop. Law), it would seem that under a contract to sell future goods no equitable interest in them passes to the buyer, unless the goods were unique in character or there were other circumstances justifying a court of equity in decreeing specific performance of the contract. *note*

§ 15. **Contract to Sell Future Goods—When Title Passes.** When a seller undertakes to sell property which he then neither owns nor possesses and the buyer is aware of that fact, the attempted sale implies an obligation on the part of the seller to acquire the goods and to transfer the title to the buyer thereafter. Title cannot pass until the thing comes into existence or into the ownership of the seller, and generally it will not pass, even then, without some further act of appropriation on the part of the seller, assented to by the buyer. The general rule is that the seller cannot make a present sale of what he does not own and title will not jump of itself to the buyer, if the seller should afterwards acquire the property. There are two exceptions to this general rule—(1) where the seller expressly gives to the buyer the power to take the goods as soon as they thereafter come into the seller's possession or ownership, as where S says to B, "I agree to sell you all the animals caught in my traps tonight for \$100 and you can go and take them out yourself tomorrow." B says, "I accept." There is no present sale in such a case. Title does not pass at the time of the bargain. Not until the buyer exercises the power of taking what is given him does he become the owner. *note*

Instead of giving such a power to the buyer, the seller might contract to transfer the goods to the buyer as soon as he, the seller, receives them. But in such a case the mere acquisition of the property by the seller would not operate as a transfer of title to the buyer, even though the parties intended that it should do so—some further act by the seller would be necessary, such as sending notice to the buyer that he has received the property and inviting him to come and take it; or in sending the property to him.

(2) Where the seller purports to make a present sale of goods which he does not own, but represents that he owns them, and the buyer is ignorant of the seller's lack of title, the seller, if he later acquires the goods, will be

estopped to deny that he had title when he purported to make the sale. In such a case it is sometimes said that title passes to the buyer by estoppel, if and when the seller actually acquires the goods.

note | § 16. **Goods In Bulk—Fungible Goods.** Frequently a contract is made for the sale of a quantity of goods or material which at the time of the bargain are an indistinguishable part of a larger mass or bulk of the same kind of goods or material; and the question arises what is the legal effect of such a contract. Does it constitute a present sale, so as to pass title at the time of the bargain, or does it give the buyer only a contract right? This subject is dealt with at length in Chapter VIII and it will suffice to say at this point that title cannot pass to units of weight or measurement of goods or materials which are not specific and ascertained at the time of the bargain.

§ 17. **Sales of Corporate Stock, Bonds, and Other Choses In Action.** Sec. 156, Pers. Prop. Law, defines "goods" as including "all chattels personal (other than things in action and money). The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

The term "goods" as defined by this Section is sufficiently broad to cover a steam tug, *Rivara vs. Stewart & Co.*, 119 Misc. 73.

Foreign money as a commodity in a contract of sale, falls within the classification of "goods" as that word is defined by this Section. *Zimmerman vs. Roessler, etc., Chemical Co.*, 240 N. Y. 501, aff'g 211 App. Div. 321; *Reisfeld vs. Jacobs*, 107 Misc. 1.

note | Foreign money, even in the form of currency, must be deemed a commodity or "goods" under the Sales Act, *Melzer vs. Zimmerman*, 118 Misc. 407.

CHAPTER III.

CAPACITY OF PARTIES.

§ 18. **In General.** The capacity of parties to make a contract of sale is declared in Sec. 83, Pers. Prop. Law, as follows:

“Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property. Where necessities are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor. Necessaries in this section mean goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery.”

§ 19. **Who Is an Infant.** An infant is a person who has not attained the age which the law deems necessary to give him full maturity of mind and below which, therefore, he requires a special protection from the State. The age of twenty-one has been arbitrarily fixed by the law for centuries as that at which either a man or woman is regarded by the law as acquiring full capacity to contract. Sec. 2, Dom. Rel. Law provides: “A minor is a person under the age of twenty-one years. A minor reaches majority at that age.” A person is considered at law as becoming of full age on the day preceding his twenty-first birthday, because the law does not take cognizance of a fraction of a day. A person may become emancipated before his twenty-first birthday, but that does not enlarge his capacity to contract. It merely entitles him to his own earnings.

§ 20. **Infant's Contracts Except For Necessaries Are Voidable, Not Void.** Contracts made during infancy are voidable at the infant's option; that is to say, they are valid until avoided or disaffirmed by the infant. *Henry vs. Root*, 33 N. Y. 526; *Continental Nat. Bank vs. Strauss*, 137 N. Y. 148, 152. Unless the infant disaffirms them, they are valid and binding on him. But contracts made for necessities are not voidable by the infant; they are binding on him. If a minor could not render himself absolutely liable for those

things which are supplied to him as actual needs, he might be compelled to go in want, for tradespeople would not care to sell him what he really needs, unless they felt sure that he would not disaffirm the contract.

§ 21. **Generally No One But the Infant Can Set Up Defense of Infancy.** In a contract between an adult and an infant, the defense of infancy is not available to the adult. The general rule is that infancy is a personal privilege, of which no one can take advantage but the infant himself. The defense of infancy is for the protection of the infant only. It cannot be set up for his benefit by persons other than the infant, except that his legal representatives such as his heirs, executors, or administrators, and probably his guardians can raise the defense of infancy. *Beardsley vs. Hotchkiss*, 90 N. Y. 201; *O'Rourke vs. Hall*, 38 App. Div. 534. But that defense is not available to his creditors, trustees or assignees in bankruptcy, assignees by purchase, sureties, or persons collaterally interested in the existence of the contract. *Yates vs. Lyon*, 61 N. Y. 344.

§ 22. **Effect of Disaffirmance by Infant.** When an infant disaffirms, that extinguishes the contract, so that if an infant disaffirms a purchase made by him and restores the property, he cannot thereafter reclaim it on the ground that he avoids his disaffirmance, because the contract is extinguished by the disaffirmance.

§ 23. **What Constitutes Disaffirmance.** It is not required that the infant show his disaffirmance in any particular form or manner. Any act which clearly shows an intent to disaffirm a contract is sufficient for the purpose. Thus a notice by the infant of his purpose to disaffirm, *Danziger vs. Iron Clad Realty Co.*, 80 Misc. 510; or the bringing of an action to recover back the consideration he parted with, *Smith vs. Ryan*, 191 N. Y. 452; or the setting up of infancy as a defense in an action brought against him on the contract are sufficient demonstrations of disaffirmance.

§ 24. **When May an Infant Disaffirm.** A contract of sale may be disaffirmed by an infant either before becoming of age, on reaching majority, or within a reasonable time thereafter. *Bartholemew vs. Finnemore*, 17 Barb. 428; *Chapman vs. Shafer*, 49 N. Y. 407.

At common law, an infant may repudiate a contract of sale and recover the article sold, even from one who purchased it in good faith from the one to whom the infant sold

it. *Miles vs. Lingerman*, 24 Ind. 385; *Millard vs. Hewlett*, 19 Wend. 301; *Stafford vs. Root*, 9 Cow. 626. But this is no longer possible under the statute in New York, as Pers. Prop. Law, Sec. 105, provides: "Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided, he buys them in good faith, for value, and without notice of the seller's defect of title."

An infant may disaffirm a contract of sale, even if he misrepresented his age so as to induce the other party to contract with him. *International Text Book Co. vs. Connelly*, 206 N. Y. 197.

§ 25. Restoration of Consideration on Disaffirmance.

As a general rule an infant must return the consideration he has received, if he disaffirms the contract, provided he still has the consideration. But if he has squandered the consideration and no longer has it, he may still disaffirm the contract, even though the parties cannot be put in *status quo*. This is a harsh rule and courts seek to limit its application by holding that if the infant has purchased personal property and had the use of it, on disaffirmance he can recover the consideration paid only in excess of the value of the use of the property to him plus its depreciation in value through such use. *Rice vs. Butler*, 160 N. Y. 578. And it has been held in New York that where an infant returns goods sold to him, he must compensate the seller for injuries to the goods sustained while in his possession. *Wheeler & Wilson Mfg. Co. vs. Jacobs*, 2 Misc. 236.

§ 26. Effect of Ratification of Contract by Infant.

As an infant's contract is valid until avoided, ratification does not, strictly speaking, create a right against the infant, but merely terminates the privilege which the law allows him of avoiding a bargain he made while under age. *Williston on Sales*, Sec. 20. If, after becoming of age, he ratifies a contract made during his minority, it becomes binding upon him. His right to disaffirm is gone forever.

§ 27. When May an Infant Ratify.

Though an infant may avoid his sales, purchases, or contracts during infancy, he can make no effective ratification until he becomes of age, for an infant's ratification clearly can be no more effectual than his original bargain. The rule which precludes him from making a binding contract prior to his majority, precludes him from so ratifying it before then.

§ 28. What Constitutes Ratification by Infant. After attaining his majority, he may ratify expressly or by his acts. His mere failure to disaffirm is not in itself a ratification, unless he is dealing with the benefits of the contract. A ratification of an infant's contract should be something more than a mere admission to a stranger that such a contract existed; there should be a promise to a party in interest or his agent, or at least an explicit admission of an existing liability from which a promise may be implied. A part payment made after coming of age may be some evidence of an intention to ratify, but is not conclusive. International Text Book Co. vs. Connelly, 206 N. Y. 197. Where an infant executed a written contract of guaranty and after he became of age wrote asking that an itemized bill be sent to him, it was held that there was no such "ratification" as to make him liable upon the guaranty. H. C. Miner Lithographing Co. vs. Santley, 150 N. Y. S. 71. No intention to ratify can be presumed from payments after majority, where they were made on the defendant's false representation that the plaintiff must pay or go to jail. Healy vs. Kellogg, 145 N. Y. S. 943. Keeping and using for an unreasonable time after majority property acquired under a contract made in infancy will amount to a ratification. If an infant after coming of age sells, uses, or even retains for an unreasonable time goods received by him during infancy, under a contract, he cannot thereafter avoid the bargain. Delano vs. Blake, 11 Wend. 85. If the infant after obtaining his majority receives and accepts performance in whole or in part from the other party to the contract, there is a ratification.

§ 29. Necessaries. No positive rule can be formulated for determining what are necessaries. Each case must be determined by the particular circumstances surrounding it. In deciding what are necessaries for an infant, the Court is not limited to what is absolutely necessary to sustain life. The word "necessaries" as used in the law is a relative term, except when applied to such things as are obviously requisite for the maintenance of existence, and depends on the social position and situation in life of the infant. And yet, in any case, the thing supplied must not be a mere luxury. An infant living with his father or guardian, who is able and willing to furnish him with everything suitable and necessary to his position in life, cannot make a binding contract, even for necessaries. International Text Book Co. vs. Connelly, 206 N. Y. 197.

What are necessities is determined not simply by the nature of the thing, but by the need of that thing at that time by the particular infant in question. Accordingly, if an infant is already supplied either by his parent or guardian or by previous purchases, with sufficient food, clothing, or other necessities, no further purchase on credit of articles of the same kind can bind him. Williston on Sales, Sec. 25. The tradesman who supplies an infant with necessities must make sure the infant is not already adequately supplied, for if he is, his contracts therefor will not bind him; for then the thing is not a necessary. If an infant, when in need, purchases more of the required goods than are essential, recovery can be had by the seller for only so much as were actually needed. Williston on Sales, Sec. 25.

Courts have said that it is immaterial whether the plaintiff, the merchant, did or did not know of the existing supply, just as it is immaterial whether he did or did not know that the defendant was a minor. Barnes vs. Toye, 13 Q. B. D. 410. If the infant is living with his parents or guardian, the burden is upon the creditor to prove that the infant was not supplied by them. Williston on Sales, Sec. 25.

An infant is not bound by his executory promise to buy necessities. Williston on Sales, Sec. 25. If the contract is in part executed, the infant is liable for the value only of that part. The necessities must have been actually supplied in order to render the infant liable. Even for undoubted necessities actually supplied, the infant is liable only for the reasonable value or what he agreed to pay, whichever is less.

§ 30. **Lunatics' Contracts.** Lunatics' contracts are voidable by the lunatic. Williston on Sales, Sec. 30. But for the same reason as in the case of infants, lunatics are liable for necessities furnished them. Insane persons require support and their contracts, express or implied, for the necessities of life, may be enforced. Bicknell vs. Spear, 38 Misc. 389.

Any conduct on the part of the lunatic who has regained his reason, which clearly indicates assent to his previous acts, ratifies them, if the lunatic was not under guardianship. The lunatic's representatives may ratify after his death a contract made by him; and so they may disaffirm the bargain. Williston on Sales, Sec. 32.

The contracts of a person of unsound mind who has not been judicially declared incompetent are voidable, not void.

[Smith vs. Ryan, 191 N. Y. 452. All contracts of a lunatic made during guardianship are invalid. Sander vs. Savage, 75 App. Div. 333. Contracts made by lunatics before office found, but within the period overreached by the finding of the jury, are not utterly void, although they are presumed to be so until capacity to contract is shown by satisfactory evidence. Hughes vs. Jones, 116 N. Y. 67.]

[The law is well settled that a lunatic whose lunacy has been judicially determined and for whom a committee had been appointed, is incapable of entering into any contract, and that any contract which he may assume to make while in that condition is absolutely void. Carter vs. Beckwith, 128 N. Y. 312. A lunatic's estate is liable for necessities furnished to him by a grocer who did not know that a committee had been appointed. Sharper vs. Wing, 2 Hun. 671. Where the insane person has had the benefit of the agreement and there was no knowledge of the insanity and no unfairness, the contract is valid. Mutual Life Ins. Co. vs. Hunt, 79 N. Y. 541.]

§ 31. **Drunkards' Contracts.** A drunkard is not incompetent like an idiot or one generally insane. He is simply incompetent upon proof that, at the time of the act challenged, his understanding was clouded or his reason dethroned by actual intoxication. Van Wyck vs. Brasher, 81 N. Y. 260, 262. It is not every degree of intoxication that renders a person incapable in a legal sense. In order to make out incapacity, it is necessary to prove that a man was so far intoxicated as to be unable in fact to understand the nature of the transaction in which he engaged. If intoxication is so extreme as to produce legal incapacity, the effect is generally held to be the same as that of insanity. Consequently, a contract or sale made under such circumstances is voidable. If a bargain is voidable on the ground of intoxication, the same consequences follow as in the case of a bargain voidable for insanity. The transaction may, therefore, be ratified. If goods are bought by one when he is drunk and kept by him when sober, he must pay the price. McKeon vs. Van Slyck, 223 N. Y. 392.

§ 32. **Married Women's Contracts.** At common law contracts entered into by married women were void; they had no capacity to contract. But by statute in New York, Domestic Relation Law, Sec. 51, it is provided that "A married woman has all the rights in respect to property, real or personal, and the acquisition, use, enjoyment and

disposition thereof, and to make contracts in respect thereto with any person, including her husband, and to carry on any business, trade, or occupation, and to exercise all powers and enjoy all rights in respect thereto and in respect to her contracts, and be liable on such contracts, as if she were unmarried; but a husband and wife cannot contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife—.

But the statutes enlarging the power of married women to contract do not remove the presumption that, when a married woman, living with her husband, orders family supplies, or other necessities, she does so on her husband's credit and not upon her own, and she is not ordinarily liable therefor. Where necessities are furnished to the wife, without any express contract as to whom the credit is extended, it seems that the presumption is that the credit was extended to the husband and not to the wife. *Baccaria vs. Landers*, 84 Misc. 396. Though the primary liability is thrown upon the husband to support his family irrespectively of the Married Woman's Property Act, a married woman may, under her power to purchase property, render herself liable upon her purchase of family necessities upon her own credit.

§ 33. **Corporations' Contracts.** Although a corporation may under its corporate name make contracts, it can make only such contracts as are expressly authorized by its charter, or necessarily incidental to its existence. All other contracts are beyond its powers, or in legal parlance, *ultra vires*. But the defense of *ultra vires* is not available where the contract has been in good faith fully performed by the plaintiff and the defendant has had the benefit of such performance and of the contract. *Vought vs. Eastern Bldg. & Loan Ass'n*, 172 N. Y. 508. It is only where the contract is still wholly executory that its *ultra vires* character will prevent its being enforced either by the corporation or by the third person.

A person dealing with a corporation is chargeable with notice of its powers and the purposes for which it is formed, and when dealing with its agents or officers is bound to know the extent of their power and authority. *Jemison vs. Bank*, 122 N. Y. 135. Neither the corporation nor the shareholders are responsible for the acts and contracts attempted to be made by the other shareholders as agents of the corporation, unless there has been some special appointment whereby such shareholders became also agents.

The stockholders are not the corporation. They compose

it, but the corporation has a name, an entity, and an existence of its own, entirely apart and distinct from that of its members. So absolutely different is the corporation's existence from that of its stockholders, that it may enter into contracts with these latter, may sue them, or be sued by them.

It is well settled that the parties who have assumed to contract with a corporation *de facto*, as such, cannot afterward in an action upon such contract, deny the legal existence of the corporation. Where a third person purchases goods from a *de facto* corporation and is sued for the purchase price, he cannot set up the non-incorporation as a defense. One who contracted with the company as a corporation cannot hold the stockholders liable as partners on the ground that, as there was a defect in its incorporation proceedings, it was never legally incorporated. A party who has entered into a contract with a *de facto* corporation which assumes to be and contracts as a corporation, is estopped from denying the corporate existence.

CHAPTER IV.

FORM OF CONTRACT OF SALE.

§ 34. **When Contract of Sale Must Be In Writing.** The common law did not require a contract for the sale of personal property to be in writing. Oral testimony was sufficient to establish the contract in court. And it is provided in Sec. 84, Pers. Prop. Law, that—"Subject to the provisions of this article and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties."

But as this encouraged fraud and perjury, Parliament in 1677 passed a statute entitled The Statute Against Frauds and Perjuries. It became popularly known as the Statute of Frauds. The seventeenth section of this Statute provided that "no contract for the sale of any goods, wares, and merchandise, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." *Conning*

This Statute, with slight changes, was copied by the Legislature of New York and is now found in Sub'd 1, Sec. 85, Pers. Prop. Law, which provides: "A contract to sell or a sale of any goods or choses in action of the value of fifty dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods, or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf." *B*

Where several articles are sold at the same time, though a separate price of less than fifty dollars is placed on each article, the transaction is regarded as a single sale, and if

the aggregate value is fifty dollars or more, the transaction is brought within the operation of the Statute. *Allard vs. Greasert*, 61 N. Y. 1.

§ 35. **The "Memorandum" May Consist of Several Connected Letters, Telegrams, Etc.** It is not necessary that the contract of sale be contained on one piece of paper signed by both parties, in order to satisfy the Statute of Frauds. Letters or telegrams may constitute sufficient written proof, if they contain all the essential terms of the agreement. *Poel vs. Brunswick-Balke-Collender Co.*, 216 N. Y. 310; *Marks vs. Cowdwin*, 226 N. Y. 138; *Spiegel vs. Lowenstein*, 162 App. Div. 443. Letters, telegrams, or letters and telegrams are sufficient, if, when taken together, they disclose all the necessary elements of the contract. *Atlas Shoe Co. vs. Lewis*, 202 App. Div. 244. Where the contract consists of several writings, telegrams, letters, etc., they must not only contain the substance of a complete agreement, but must also refer to each other. Parol evidence is not admissible to connect the various writings or to supply any of the material terms of the contract. *Wilson vs. Lewiston Mill Co.*, 150 N. Y. 314; *Wright vs. Weeks*, 25 N. Y. 153, 160; *Coe vs. Tough*, 116 N. Y. 273; *Dawson vs. Margolies*, 126 Misc. 39. The memorandum, letters, or telegrams should contain (1) a description of the subject-matter, (2) the name of the parties, (3) a statement of the consideration, (4) the terms as to payment of price and deliveries, and (5) the signature of the party to be charged with liability.

§ 36. **The Memorandum Need Not be Signed by Both Parties.** It is not necessary that the memorandum, letters, or telegrams should be signed by both parties. *Taubin vs. Manowitz*, 187 N. Y. S. 174. Since the memorandum is not the contract, but only evidence of it, the signing by only one party is not lack of mutuality. When the memorandum is signed by only one of the parties, it is not enforceable against the one who did not sign; e. g., an action cannot be maintained by the seller against the buyer, if the seller only signed. *Levitt vs. Sliman*, 137 N. Y. S. 904.

§ 37. **Printed Name of Party to be Charged Appearing Anywhere on Memorandum Will Suffice.** The Statute requires that contracts for sale of goods of over the value of fifty dollars must be in writing and signed by the party to be charged. But the Statute does not specify any particular form of signing. The party's name printed on the memoran-

dum fully satisfies the Statute, if it is shown to have been adopted by him as his signature, even though it was printed at the top of the memorandum. Pearlberg vs. Levisohn, 112 Misc. 95; Goldowitz vs. Kupfer & Co., 80 Misc. 487. Where the Statute merely requires the memorandum to be signed and not subscribed, it is complied with if the signature appears upon any part of the paper. Where the Statute requires the contract to be "signed" by the party to be charged, the signature of that party need not be in his own handwriting, but may be made by adoption of a typewritten or printed signature appearing anywhere on the paper, either at the top, in the middle, or at the bottom. Clason vs. Bailey, 14 Johns. 484; Doughty vs. Manhattan Brass Co., 101 N. Y. 644.

§ 38. **Memorandum May be Signed at a Time Subsequent to Making Oral Contract.** The memorandum may be signed by the party to be charged at any time after the oral contract is made, provided it be signed before an action is brought to enforce it. Mentz vs. Newwitter, 122 N. Y. 491.

§ 39. **If Part of Price Is Paid, or Part of Goods Delivered, No Written Memorandum Is Necessary.** The fact that the buyer has paid a part of the price, or the seller has delivered and the buyer has accepted a part or all of the property, furnishes unequivocal evidence of a contract between the buyer and the seller and hence, may be taken as a substitute for a written memorandum. In New York a contract for the sale of goods of the value of fifty dollars or more must be in writing, unless the buyer (1) accepts and receives a part of the goods; or (2) pays part of the purchase price. note

§ 40. **Buyer Must Not Only Receive But Accept Part of Goods, Otherwise Written Memorandum Is Necessary.** Acceptance and receipt are distinct terms. There may be receipt without acceptance. The receipt by the buyer may be and often is for the express purpose of seeing whether he will accept or not. Cooke vs. Millard, 65 N. Y. 352, 368. Delivery of goods subject to an examination is not sufficient to constitute an acceptance. Stone vs. Browne, 68 N. Y. 598. The buyer must have an opportunity to make an examination and pronounce the goods satisfactory, or do some act showing his intention to accept them.

Delivery by the seller without acceptance by the buyer will not satisfy the Statute, even though the goods may have been received into the possession of the buyer. Young vs.

Ingalsbe, 208 N. Y. 503. The design of the Statute is that neither party can create the evidence which shall prove an oral contract as against the other. Richardson's Outline of Contracts, Sec. 280.

Mere delivery to a carrier designated by the buyer who refuses to accept the goods is not such a delivery and acceptance as to answer the Statute of Frauds. A mere carrier designated by the buyer cannot both accept and receive the goods, so as to answer the Statute, because generally the carrier has not been given authority to both receive *and* accept the goods, although he is given authority to receive and transport. Allard vs. Greasart, 61 N. Y. 1. In Sub'd 3, Sec. 85, Pers. Prop. Law, it is provided that "There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods."

§ 41. **Part Delivery and Acceptance at Any Time After Oral Contract Is Made Will Suffice.** Where the enforceability of an oral contract for the sale of goods depends upon the acceptance and receipt of a part of the goods, the Statute omits to require the acceptance and receipt to be at the time of the making of the contract. Therefore, delivery and acceptance of a part of the goods at any time after the making of the contract will take it out of the Statute of Frauds. Thedford vs. Herbert, 195 N. Y. 63.

note § 42. **What Constitutes Part Payment.** The promissory note of the buyer is not sufficient to constitute part payment, so as to take the case out of the Statute. In Krohn vs. Bantz, 68 Ind. 277, the Court stated the following as the reason: "the statute requires something more than words; it requires part payment, and not a promise of part payment to be received as payment." See also Combs vs. Batemen, 10 Barb. 573. But acceptance of the note of a third person is sufficient, if it is taken absolutely. Ireland vs. Johnson, 18 Abb. Pr. 392; Artcher vs. Zeh, 5 Hill. 200.

note § 43. **Part Payment Any Time After Oral Contract Is Made Will Suffice.** Formerly the Statute in this State required part payment to be made "at the time" of the making of the contract of sale. The Statute was amended by omitting the words "at the time." Therefore, a part payment made at any time before an action is brought to enforce the contract is sufficient to take it out of the Statute. Gordon vs. Witty, 198 App. Div. 333.

§ 44. Contracts for the Manufacture and Sale of Goods.

Formerly a contract for the manufacture and sale of goods not in existence at the time of the bargain was considered as a contract for work, labor, and services and not to come within the term "sale of goods, wares, and merchandise." But Sub'd 2, Sec. 85, Pers. Prop. Law of N. Y., now provides:

"The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply."

Under the present statute, if the goods are to be manufactured and are suitable for sale to others in the ordinary course of the seller's business, the contract is not for work and labor, but is one of sale, and must, therefore, be in writing. *Pearlberg vs. Levisohn*, 112 Misc. 95; *Zimmerman vs. Gillman*, 172 N. Y. S. 263. But if the goods are to be made especially to the order of the buyer and when completed are not suitable for sale to others, the contract does not need to be in writing to be enforceable. *Goldowitz vs. Kupfer*, 80 Misc. 487; *Schneider vs. Lezinsky*, 162 N. Y. S. 769. note

§ 45. Auctioneer Is Agent of Buyer to Sign Memorandum of Sale. At an auction sale the auctioneer is not only the agent of the seller, but, for the purpose of making and signing the memorandum required by the Statute of Frauds, is also the agent of the buyer. Sub'd 6, Sec. 31, Pers. Prop. Law; *Mentz vs. Newwitter*, 122 N. Y. 491; *Shongut vs. Meyers*, 168 N. Y. S. 2. But the auctioneer's authority for this purpose is so temporary that he must sign the memorandum immediately or it will not be binding, *Hicks vs. Whitmore*, 12 Wend. 548; and between the fall of the hammer and the writing of the memorandum, the bidder has a *locus poenitentiae* and may withdraw his bid, or the seller of the property may revoke the auctioneer's authority, *Byrne vs. Fremont Realty Co.*, 120 App. Div. 692. If the auctioneer was himself the highest bidder on behalf of the seller or on his own behalf, he cannot sign the memorandum as agent for the buyer. *Meyer vs. Redmond*, 205 N. Y. 478.

CHAPTER V.

CONDITIONAL SALES.

§ 46. **Definition of, and Scope of Chapter.** A conditional sale is defined in Sec. 61, Pers. Prop. Law, as meaning "(1) any contract for the sale of goods under which possession is delivered to the buyer and the property in the goods is to vest in the buyer at a subsequent time upon the payment of part or all of the price, or upon the performance of any other condition or the happening of any contingency; or (2) any contract for the bailment or leasing of goods by which the bailee or lessee contracts to pay as compensation a sum substantially equivalent to the value of the goods, and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming the owner of such goods upon full compliance with the terms of the contract."

As stated in an earlier section (sec. 9, *supra*) the term "conditional sale" should be limited and is limited in this chapter to transactions in which the seller gives possession to the buyer but does not agree to transfer title until the buyer pays the price.

Although the parties may call the agreement a conditional sales contract, it will not be so regarded by the Courts, if it does not provide for reservation of title in the seller, even though it does provide that in the event of the buyer's failure to pay an installment when due, the seller may elect to consider the entire balance unpaid and retake the property. Such a contract was recently held to be in the nature of an outright sale and giving back a purchase-money mortgage and not a conditional sale, *Edson & Co. vs. Hudson Motor Car Co.*, 228 N. Y. S. 582.

§ 47. **The Title Retained by Conditional Sellers Is Security Title Only, Risk of Loss and Beneficial Ownership Passing to Conditional Buyer.** A transaction is not a conditional sale unless it expressly reserves title in the seller until performance of the condition by the buyer. *Edson & Co. vs. Hudson Motor Car Co.*, 228 N. Y. S. 582. But the title thus reserved to the seller is not an absolute title, for in the absence of any provision in the contract to the contrary, the buyer may, upon giving due notice to the seller, sell, mort-

gage, or otherwise dispose of his interest in the property, even without the consent of the conditional seller. Sec. 73, Pers. Prop. Law. Thus, prior to performance by the buyer of the condition, he has an interest in the property which he can transfer. That such interest is more than a mere contract right against the seller is shown by the provisions of Section 62, which give him a right to the goods themselves upon performance of the condition, and which prevent the seller from replevying the goods, as long as the buyer is not in default in paying the price; and, further, by the provisions of Sec. 80-g which place the risk of loss or injury to the goods upon the buyer after they are delivered into his possession.

Therefore, although the title remains in the seller, it is only a security title and the buyer is recognized as having a property right to the articles, which the seller cannot defeat by refusing to accept tender of the price. The Supreme Court of the United States has said, "No doubt the right to perform it (the conditional sale) and thereby to acquire the ownership was a property right." *Bailey vs. Baker Ice Co.*, 239 U. S. 268.

§ 48. **Right of Buyer to Sell or Mortgage the Property Prior to Payment of All Installments of Price.** The right of the conditional buyer may be assigned by sale or mortgage, *Powers vs. Burdick*, 110 N. Y. S. 883; though such a disposition cannot diminish the conditional buyer's liability to pay the price, *Breakstone vs. Buffalo Foundry Co.*, 167 App. Div. 62, nor give the sub-purchaser the legal title to the property if the price is not paid.

It seems that if the conditional sale contract expressly reserves title in the seller until all the installments of price are paid, a provision in the contract that the buyer may not sell or mortgage the property prior to payment of all the price without the consent of the seller, is valid. But if the conditional sale contract does not expressly reserve title in the seller until the price is completely paid, although it may provide that upon failure to pay any installment the seller may accelerate payment of the balance and retake the goods, a clause that "no right or interest of the buyer in, to, or under this contract or in the property shall be assignable or transferable by him" is unenforceable as a restraint on the buyer's power of alienation. Such a clause, where the contract did not reserve title in the seller, is violative of the statute against the restraint of the power of alienation and

also the common law rule of perpetuities. *Edson & Co. vs. Hudson Motor Car Co.*, 228 N. Y. S. 582.

§ 49. **Seller's Rights Where Buyer Has Sold, Mortgaged, or Subjected the Property to a Lien Prior to Payment of the Price.** If the buyer sells, mortgages, or otherwise disposes of the goods prior to payment of the price, without giving notice to the seller of the name and address of the person to whom he so disposes of the goods at least ten days before such disposition, the seller may retake possession of the goods and deal with them as in the case of default in payment of part or all of the purchase price. Sec. 73, Pers. Prop. Law. The purpose of requiring the notice here referred to is that the seller may file the conditional sale contract or a copy thereof in the filing district of the person to whom the goods are sold or mortgaged, if it is different from the district in which the goods were delivered to the conditional buyer.

It is well settled that the seller is not estopped, by his conduct in delivering possession of the goods to the buyer under a conditional sale, from asserting his title against one who purchases from the buyer, relying upon the apparent title of the latter, if the conditional sale contract was properly filed. The seller's title, however, is subordinated to an innkeeper's lien, even though the conditional sale was recorded, *Waters vs. Gerard*, 189 N. Y. 302; but the seller's title prevails over an asserted lien of one who makes repairs on the order of the conditional buyer, *Ludwig, Bauman Co. vs. Roth*, 67 Misc. 458. It has been held in New York that the garage-keeper's lien is superior to that of the conditional seller, even if the contract of sale was recorded. *Wolfman Co., Inc. vs. Eisenberg*, 116 Misc. 43; *Courtlandt Garage vs. N. Y. Yellow Cab Co.*, 215 N. Y. S. 789.

§ 50. **Seller's Liability For Breach of Warranty In Conditional Sales.** In *Peuser vs. Marsh*, 167 App. Div. 604, the Appellate Division held, in a replevin action to recover property held by defendant under a conditional contract of sale, that the right of counterclaim for breach of warranty did not exist for the reason that warranty is an incident of a completed sale, and has no vitality or force in an executory contract of sale. But on appeal, this decision was reversed by the Court of Appeals in 218 N. Y. 505, in which it was held that under Sec. 150, Pers. Prop. Law, a breach of warranty might be pleaded as a defense by way of recoupment.

In *Russo vs. Lavender*, 216 App. Div. 823, it was held that Sec. 150, Pers. Prop. Law, is applicable to conditional sales. Indeed, it is expressly provided in Sec. 62, Pers. Prop. Law, that "The seller shall be liable to the buyer for the breach of all promises and warranties, express or implied, made in the conditional sale contract, whether or not the property in the goods has passed to the buyer."

§ 51. **Requirements as to Original Filing of Conditional Sales Contract.** It is an objection to conditional sales that the apparent ownership is in the conditional buyer, and this is apt to defraud innocent third person purchasers from the buyer. To avoid this objection, statutes require the conditional sales contract to be filed. Sec. 66, Pers. Prop. Law, provides—

"The conditional sale contract or a copy thereof shall be filed in the office of the city or town clerk in the city or town in which the purchaser resides, if he resides within the state at the time of the execution thereof, and if not, in the city or town where the goods are first kept for use by the buyer after sale, except that where there is a county clerk's office in such city or town in which such conditional sale contract or copy thereof is required to be filed as aforesaid, such conditional sale contract or copy thereof shall be filed in such county clerk's office and except that such conditional sale contract or copy shall be filed in the city of New York as follows, namely: In the borough of Brooklyn, in said city, such instrument shall be filed in the office of the register of the county of Kings; in the borough of Queens, in said city, such instrument shall be filed in the office of the clerk of Queens county; in the borough of Richmond, in said city, in the office of the clerk of the county of Richmond; in the borough of Manhattan, in said city, in the office of the register of the county of New York; in the borough of Bronx, in said city, in the office of the register of the county of Bronx. This section shall not apply to the contracts described in sections sixty-seven and sixty-eight."

Of course, as between the parties themselves, the contract of conditional sale is valid, though it is not filed anywhere, or even put in writing. And a subsequent purchaser or mortgagee, with knowledge of the rights of a conditional vendor in the property, cannot avail himself of the fact that the contract of conditional sale was not filed. *Biederman vs. Edison & Co., Inc.*, 128 Misc. 255. But the Pers. Prop. Law, Sec. 65, provides that every provision in a conditional

sale reserving property in the seller shall be void as to any purchaser from or creditor of the buyer, who without notice of such provision purchases the goods or acquires by attachment or levy a lien upon them before the contract is filed.

§ 52. Requirements as to Refiling Conditional Sales Contract. A filing of a conditional sale contract reserves the right of the seller against innocent purchasers for value only for a period of three years. If the price has not been paid by that time, the conditional seller, in order to further protect his rights, should refile the conditional sale contract or a copy thereof, within thirty days next preceding the end of the three years from the date of the contract, together with a statement attached thereto signed by the seller showing that the contract is still in force and the amount remaining to be paid thereon. Sec. 71, Pers. Prop. Law. After the expiration of the first three years, the conditional sale contract must be refiled every year as long as the price is unpaid, in order to be valid against subsequent purchasers or mortgagees from the buyer. Sec. 71, Pers. Prop. Law.

It should be noted that Sec. 80-j, Pers. Prop. Law, provides: "Nothing in this article contained shall be deemed to affect the provisions of sections sixty-four of the personal property law, or any other provisions of law regulating or relating to the official method of filing, refileing, indexing, canceling or satisfying contracts of conditional sale filed in any of the counties within the city of New York, or the fees payable therefor." The section sixty-four referred to was Sec. 64 of the old law of conditional sales prior to 1922, when the Uniform Conditional Sales Act was adopted. It provided that conditional contracts for the sale of goods and chattels, attached or to be attached to a building, should be invalid as against creditors of the conditional vendee and against subsequent purchasers or mortgagees in good faith of such goods and chattels or of the premises upon which the said building stands, after the expiration of the first or any succeeding term of one year, reckoning from the time of the first filing, unless within thirty days preceding the expiration of such term the contract were refiled. Inasmuch as Sec. 71, Pers. Prop. Law, provides that the filing of conditional sale contracts provided for in Sec. 65, 66, and 67 (including sales of goods to be affixed to realty) shall be valid for a period of three years only, unless refiled within thirty days before the expiration of three years from the first filing and then refiled yearly thereafter, it would appear

that under Sec. 80-j, Pers. Prop. Law, it may still be necessary to refile in any of the counties of New York City within one year from the date of the first filing. See *American Soda Fountain Co. vs. Najarian*, (1922) 119 Misc. 219.

§ 53. **Buyer's Right to Remove the Property Before Paying All of the Installments.** If the buyer removes the property sold from one filing district to another for a longer period than thirty days, he must, not less than ten days before such removal, give the seller written notice of the place to which the property is to be removed. Sec. 73, Pers. Prop. Law. This is to enable the seller to file the conditional sale contract in the new filing district to which the property is to be removed. Unless the seller does so, he will lose his right to the property as against subsequent purchasers or mortgagees from the buyer in the new district. If the buyer neglects to give notice of removal to the seller, not only may he incur a penalty but the seller may retake possession of the property and deal with it as if default in payment had been made. And it would seem that the seller may exercise such a right even against innocent purchasers for value in the new district, if the buyer has not given the notice of removal; for until the seller is in a position where he can protect his rights by filing the contract in the place to which the property is taken, the reservation of title in him is good. *Goetschius vs. Brightman*, 245 N. Y. 186.

§ 54. **Seller's Right to Retake Possession Upon Default.** Until there is a default in payment or other condition, the seller has no right to retake possession, save only in the instances where the buyer removes the property to another filing district or resells or mortgages the property, without giving due notice to the seller. But upon default in payment or other condition, Sec. 76 of the Pers. Prop. Law provides that the seller may retake possession. Unless the goods can be retaken without breach of the peace, they must be taken by legal process. If the seller decides to retake possession, he must give written notice to the buyer of such intention, not more than 40 nor less than 20 days prior to the retaking. This notice should state the default and the period at the end of which the goods will be retaken. Sec. 77, Pers. Prop. Law.

It should be noted that under Sec. 77, the giving of notice by the seller prior to retaking is not obligatory on the seller; he may retake possession of the goods without notice. But if the seller retakes possession of the goods with-

out giving notice to the buyer, the buyer under Sec. 78 has the right of redeeming the property within 10 days after it is taken away from him. If the seller gives the notice between 40 and 20 days prior to the retaking, he thereby cuts off the buyer's right to redeem the goods after the retaking.

§ 55. When Resale of the Goods by the Seller for Buyer's Account Is Compulsory After Retaking Them. If the buyer does not redeem the goods within ten days after the seller has taken possession and the buyer had paid at least 50% of the purchase price, the seller must sell them at public auction within 30 days after the retaking. The seller must give the buyer not less than ten days' written notice of this sale and must also give notice of the sale by at least three notices posted in different public places within the filing district where the goods are to be sold, at least five days before the sale. If at the time of the retaking, \$500 or more have been paid on the purchase price, the seller must also give notice of the sale at least five days before the sale by publication in a newspaper, published or having a general circulation within the filing district where the goods are to be sold. Sec. 79, Pers. Prop. Law. The seller is not required to wait until after the expiration of the ten days allowed the buyer within which to redeem, before serving the notice of sale. The only limitation in Sec. 79 in respect to the time of the holding of the sale is the provision that "such sale be held not more than 30 days after the retaking." *Commercial Credit Corp. vs. Goldberg*, 130 Misc. 597.

If the buyer has not paid at least 50% of the purchase price at the time of retaking, the seller need not resell the goods at public sale, unless the buyer served upon him within 10 days after the retaking a written notice demanding a resale. Sec. 80, Pers. Prop. Law. Where the buyer has not paid at least 50% of the purchase price and has not demanded that the seller resell the goods at public sale, the seller may retain the goods as his own property without any obligation to account to the buyer; but that will discharge the buyer from any further obligation to pay the balance of the installments. Sec. 80-c, Pers. Prop. Law.

§ 56. Proceeds of Compulsory Resale How Applied. If the buyer had paid more than 50% of the price or had demanded a resale within ten days after the retaking, and there is a resale, the proceeds shall be applied in the following order: (1) to the payment of the expenses of the sale, (2) to the payment of the expenses of retaking, keeping, and

storing the goods, (3) to the satisfaction of the balance due under the contract: any sum remaining after the satisfaction of such claims shall be paid to the buyer. Sec. 80-a, Pers. Prop. Law. If the proceeds of the sale are not sufficient to defray the expenses of the sale, and also the expenses of retaking, keeping, and storing the goods, and the balance due upon the purchase price, the seller may recover the deficiency from the buyer or from any one who has succeeded to the obligations of the buyer. Sec. 80-b, Pers. Prop. Law.

§ 57. **Buyer's Damages Where Seller Resells Upon Insufficient Notice, or Refuses to Resell—Recovery of Part Payments.** If the buyer had demanded a resale and the seller had refused to resell or had resold the goods upon insufficient notice, the buyer may recover from the seller his actual damages, if any, and in no event less than $\frac{1}{4}$ th of the sum of all payments which have been made under the contract, with interest. Sec. 80-e, Pers. Prop. Law. The actual damages would be the value of the property at the time it was taken from him, since the unlawful sale by the seller amounted to a conversion or wrongful disposal of the property, less the amount the buyer still owed the seller on the property; but, in any event, if the Court should find that the difference between the said value and the amount owed by the buyer is less than one quarter of the sum of all the payments which have been made under the contract, the buyer is entitled to the latter amount with interest. Fisher vs. Stewart Motor Corp., 228 N. Y. S. 549.

§ 58. **Buyer's Further Liability on the Contract (a) Where Seller Retakes Possession and (b) Where Seller Does Not Retake Possession.** After the retaking of possession, the buyer is liable for further payments only in the event of a resale by the seller at public auction, and then only if there is a deficiency. Sec. 80-d, Pers. Prop. Law.

Instead of retaking possession, the seller may bring an action against the buyer for the recovery of the whole or any part of the price still remaining unpaid. Sec. 80-d, Pers. Prop. Law.

§ 59. **Election of Remedies Open to Seller Where Buyer Defaults In Payment.** If the buyer defaults in paying one or more installments of the price, the seller may (1) retake possession upon proper notice, under Secs. 76 and 77; or (2) bring an action against the buyer for the recovery of the

whole or any part of the price still remaining unpaid, under Sec. 80-d; or (3) bring an action in the Municipal Court to foreclose a lien on a chattel, under Sec. 70, Municipal Court Code, which makes a contract of conditional sale a lien upon the purchased chattel. If in the action for the recovery of the balance of the price, the seller recovers a wholly or partially unsatisfied judgment, or collects a part only of the price, he may still retake possession. Only where he has collected the entire price, or has claimed a lien upon the goods, or attached them, or levied upon them as the goods of the buyer, is the seller barred from retaking possession. Sec. 80-d, Pers. Prop. Law.

Where a contract of conditional sale provided that title should remain in the seller until payment, and that on default of any payment on any note, all notes should become due, an action by the seller on the notes did not bar a subsequent action to replevy the goods in the hands of a third person. *Amer. Soda Fountain Co. vs. Najarian*, 195 N. Y. S. 555.

§ 60. **Waiver of Statutory Protection.** The statute expressly states that the buyer cannot waive the right to notice upon retaking or reselling. If the conditional contract of sale contains a provision that the seller might retake or resell the goods without notice, such a provision is not binding on the buyer. Sec. 80-I, Pers. Prop. Law. There can be no waiver of the provisions of the statute protecting the conditional vendee, either by waiver in the contract itself or by waiver at the time of or after default of any payment by the buyer. *Adler vs. Weis & Fisher Co.*, 218 N. Y. 295.

But it seems that a new agreement founded upon a new consideration made after a default under the contract is valid and enforceable. *Seeley vs. Prentiss Tool & Supply Co.*, 158 App. Div. 853. It becomes important, therefore, to determine under the facts and circumstances of each case whether the arrangement entered into after default was a mere waiver, or a new agreement for a new consideration. For example, where, after the seller has retaken possession, the buyer told him that if he would hold the property and not resell it, he would pay the balance due upon it, it was held that this arrangement was a mere waiver and, therefore, invalid and did not excuse the seller from the statutory requirement of reselling the property within 30 days, more than 50% of the price having been paid. As the conditional seller sold the property after the expiration of the 30 days,

it was held that the sale was unlawful and amounted to a conversion for which the conditional vendee could have damages under Sec. 80-e. *Fisher vs. Stewart Motor Corp.*, 228 N. Y. S. 549. In that case no new consideration passed between the parties. There was no consideration for the defendant's promise not to resell within 30 days, because in return the plaintiff promised to do only what he was already legally obliged to do, i.e., pay the balance. On the other hand, where, after the buyer had defaulted, it was agreed that if the buyer would return the goods, the seller would accept them in full settlement of the balance due and in addition cancel and return the unpaid notes given for the price, it was held that the arrangement was not a mere waiver, but a new contract for a new consideration. *Seeley vs. Prentiss Tool & Supply Co.*, *supra*.

Where a new contract supported by new consideration is entered into, it is a new and different transaction subsequent to the original contract and supplants it to the extent that it is no longer in existence and its conditions no longer prevail. In the case of *Breakstone vs. Buffalo Foundry and Machine Co.*, 167 App. Div. 63, the Court laid down a principle of law applicable to questions of this sort—"A vendee, under a contract of conditional sale may, when he is in default, by an agreement with the vendor, by which the latter is *induced* to retake the property, waive or become estopped from asserting any rights he might otherwise have had under the statute, *if the vendor had reclaimed* the property *as a matter of right*, by virtue of the terms of the contract."

§ 61. **The Fixture Statute.** Conditional sale contracts of chattels to be affixed to realty so as to become a part thereof are subject to a different requirement as to filing than conditional sale contracts of chattels not to be so affixed. The latter are required under Sec. 66, to be filed in the office where personal property records are kept, alongside chattel mortgages. But if the chattel is to be attached to land or a building, it is going to be held out to the world as a part of the realty, although the parties to the conditional sale contract may agree that it shall keep its status as personalty. Creditors and subsequent purchasers, the persons for whose benefit the recording acts are enacted, are going to regard the goods conditionally sold as a part of the realty to which they are attached; hence, if the conditional seller is to be given protection on the theory of constructive notice by filing, he should

be required to file the contract of sale in the place where records relating to the realty are kept, for it would be unreasonable to ask purchasers and mortgagees of realty to search in the personal property records regarding every article connected with a building which might have been sold separately, and it is so provided in Sec. 67, as follows:

"If the goods are so affixed to realty at the time of a conditional sale or subsequently as to become a part thereof and not to be severable wholly or in any portion without material injury to the freehold, the reservation of property as to any portion not so severable shall be void after the goods are so affixed as against any person who has not expressly assented to the reservation. If the goods are so affixed to realty at the time of a conditional sale or subsequently as to become part thereof, but to be severable without material injury to the freehold, the reservation of property shall be void after the goods are so affixed as against subsequent purchasers of the realty for value and without notice of the conditional seller's title, unless the conditional sale contract, or a copy thereof, together with a statement signed by the seller briefly describing the realty and stating that the goods are or are not to be affixed thereto, shall be filed before such purchase in the office where a deed of the realty would be recorded or registered to affect such realty. As against the owner of realty the reservation of the property in goods by a conditional seller shall be void when such goods are to be so affixed to the realty as to become part thereof but to be severable without material injury to the freehold, unless the conditional sale contract, or a copy thereof, together with a statement signed by the seller briefly describing the realty and stating that the goods are to be affixed thereto, shall be filed before they are affixed, in the office where a deed would be recorded or registered to affect such realty."

There are several situations in which the question of the validity of the conditional seller's reservation of title might arise. (1) *As between the conditional vendor and a conditional vendee who is the owner of the realty.* If we look at the last sentence of Sec. 67, it would seem that the reservation of title to the conditional seller would be void as against the owner of the realty, unless the conditional sale contract were filed. But this cannot be, in view of the provisions of the first sentence in Sec. 67, which in substance declares that the reservation of title in the conditional seller shall be good as against any person who has expressly assented to the

reservation; and certainly the owner of the building, being the conditional vendee, has expressly assented to such reservation of title in the conditional sale contract itself. It must, therefore, be that as between the buyer and the conditional seller the reservation of title in the conditional seller is good without the necessity of filing the conditional bill of sale. Regarding Sec. 67 as a whole, it is apparent that the last sentence does not apply to a case of a direct contract of conditional sale between the owner and the seller; the first sentence alone covers such a case. (2) *As between the conditional vendor and subsequent purchasers or mortgagees of the building where the chattels were sold directly to the owner of the building as conditional vendee.* The second sentence of Sec. 67 requires the conditional bill of sale to be filed before the purchase, in order for the reservation of title to be good as against subsequent purchasers or mortgagees of the building after the goods are affixed, even though the conditional sale contract was directly between the owner of the building and the conditional seller.

(3) *As between the conditional seller and the owner of the building where the contract of conditional sale was made with a lessee of the building or a part thereof or with a building contractor or material man who is to install the chattels in the building.* Where that is the case, the last sentence of Sec. 67 provides that the reservation of title is void as against the owner of the building, unless the conditional sale contract was filed before the goods were affixed.

In other words, the first sentence of Sec. 67 applies where there is a direct contract of conditional sale between the owner of the building and the conditional seller and the reservation of title is good as against the owner without filing the bill of sale. But under the second sentence, the reservation of title is not good after the goods are affixed, against subsequent purchasers or mortgagees of the building, unless the conditional sale contract was filed before the purchase. And under the last sentence, the reservation of title is not good against the owner of the building where the conditional sale contract was made by the conditional seller with the lessee of the building or with a building contractor or material man, unless it were filed before the goods were affixed.

§ 62. When a Conditional Sale of Chattels Comes Within the Scope of the Fixture Statute. The filing requirements of Sec. 67 apply only "if the goods are so affixed to

realty at the time of a conditional sale or subsequently *as to become a part thereof.*" It would, therefore, seem that the filing requirements of Sec. 67 do not necessarily apply to all chattels which are or are to be affixed to realty, but only to such as are or are to become "a part thereof." Formerly it appears to have been the rule that a chattel affixed to realty did not become a part thereof, if it was removable without its practical destruction or material injury to the freehold. For example, gas ranges attached to an apartment by service pipes and ordinary stove pipe flues were held not to be so affixed to realty as to become a part thereof, and even when so affixed, did not lose their character as personal property. *Central Union Gas Co. vs. Browning*, 210 N. Y. 10. But in a recent case, where gas ranges were sold under a conditional sale contract to the owner of an apartment house to be installed in such a way that they were severable without material injury to the apartment house, it was held that they came within the scope of the fixture statute, and that the conditional sale contract should have been filed in accordance with the requirements of Sec. 67, in order for the reservation of title in the conditional seller to be valid against subsequent mortgagees of the building. *Cohen vs. 1165 Fulton Ave. Corp.*, 222 App. Div. 378. In that case the Appellate Division decided that inasmuch as Sec. 67 includes both goods affixed to the realty and readily severable (second and third sentences) and goods affixed to the realty and not readily severable (first sentence), the legislature evidently sought to change the rule which gave the character of realty only to goods which were technically chattels real. Likewise, a conditional sale of an electric light plant installed in the cellar of a hotel in such a manner as to be removable without injury to the building, must be filed according to the provisions of Sec. 67, in order that the conditional seller's reservation of title be good as against a subsequent purchaser of the realty at a foreclosure sale of the contract for the sale of the hotel and land, under which the conditional buyer of the electric light plant was vendee in possession. *Kohler Co. Inc. vs. Brasun*, 249 N. Y. 224, reversing 222 App. Div. 338.

Under the present statute the question as to whether chattels affixed to realty "become a part thereof" is no longer to be determined by the intent of the parties. *Metro-politan Stone Works vs. Probel Holding Corp.*, 131 Misc. 519.

§ 63. **Loss and Increase.** Generally in the Law of Sales, risk of loss rests on the person who has the title. But where the seller has reserved a security title only and the beneficial interest has passed to the buyer, i.e., the right to possession, enjoyment of the use, and right to transfer to others, the risk of loss rests on the buyer. So in a conditional sale contract, where the seller has reserved only a security title and the buyer has the right to possess, use, mortgage, and transfer the property to others, the risk of loss is on the buyer. This is provided for in Sec. 80-g of the Pers. Prop. Law, as follows: "After the delivery of the goods to the buyer and prior to the retaking of them by the seller, the risk of injury and loss shall rest upon the buyer. The increase of the goods shall be subject to the same conditions as the original goods."

§ 64. **A Lease of Personal Property With Option to Purchase Will, in Some Instances, Be Treated As a Conditional Sale, Subject to Filing Requirements.** "Sellers desirous of making conditional sales of their goods, but who do not wish openly to make a bargain in that form, for one reason or another, have frequently resorted to the device of making contracts in the form of leases either with options to the buyer to purchase for a small consideration at the end of the term, provided the so-called rent has been duly paid, or with stipulations that if the rent throughout the term is paid, title shall thereupon vest in the lessee. It is obvious that such transactions are leases only in name. The so-called rent must necessarily be regarded as payment of the price in instalments, since the due payment of the agreed amount results, by the terms of the bargain, in the transfer of title to the lessee." Williston on Sales, Sec. 336. In such cases the Courts of New York have disregarded the form of the transaction and have held that where the payment of the so-called rent nearly or quite pays the price of the goods, and is intended as payment of the price under the option to purchase, the bargain is a conditional sale, and subject to the rules of filing requirements applicable to conditional sale contracts. *Central Union Gas Co. vs. Browning*, 210 N. Y. 10; *Bramhall & Deane Co. vs. McDonald*, 172 App. Div. 780. But, although the rent is to be applied at the buyer's option toward the payment of the price, the transaction is not a conditional sale, if the price payable upon the buyer's exercising the option largely exceeds the rent the lessee is bound to pay. *Singer Sewing*

Mach. Co. vs. Independent Waist Band Mfg. Co., 141 N. Y. S. 488; Williston on Sales, Sec. 336.

It is an essential feature of a conditional, as of every other, contract of sale, that the buyer be bound to take title or at least pay the price. Therefore, even though the lease provides that if rent is paid for a certain period, the lessee shall thereupon become the owner of the property, if it also provides that the lessee can terminate the transaction at any time by returning the property, it will not be treated as a conditional sale. Williston on Sales, Sec. 336.

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note
§ 65. **Distinction Between Conditional Sales and Chattel Mortgages.** In many respects the two transactions are similar; both the conditional seller and chattel mortgagee have security title, while the conditional buyer and mortgagor have the beneficial interest in the property and bear the risk of loss. But in a conditional sale there is no passing of title at all, until the performance of the condition; whereas, in a chattel mortgage title passes at once to the mortgagee, subject to be defeated by the mortgagor's payment of the amount due. In a conditional sale, payment of the price is a condition precedent to title passing, but in a chattel mortgage, payment is a condition subsequent to title passing.

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In Interstate Ice etc. Corp. vs. United States Fire Ins. Co., 243 N. Y. 95, aff'g 215 App. Div. 768, a writing stating that the price of machinery, payable in installments, was to be a certain sum with interest on the deferred payments and that "it is understood that we are to retain title to all of the above equipment until same has been fully paid for," was held not to be a contract for a chattel mortgage, but a contract of conditional sale.

§ 66. **Distinction Between Conditional Sale and Consignment.** For a discussion of the distinction between conditional sale and consignment, see secs. 73-78 incl., infra.

title
seller
chattel
mortgagee
Buyer
conditional
sale

CHAPTER VI.

DISTINCTIONS BETWEEN SALE ON APPROVAL, SALE OR RETURN, SALE ON MEMORANDUM, AND CONSIGNMENT OR AGENCY CONTRACTS.

§ 67. **Sale on Approval.** It is possible for the parties to agree that the buyer shall temporarily take the goods into his possession to see whether they are satisfactory to him, and if they are not, he may refuse to become the owner. This is known as a sale "on approval" and is provided for in Sec. 100, Rule 3, Sub'd 2, Pers. Prop. Law, as follows: "When goods are delivered to the buyer on approval or on trial, or on satisfaction, or other similar terms, the property therein passes to the buyer (a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction. (b) If he does not signify his approval or acceptance to the seller, but retains the goods, without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and if no time has been fixed, on the expiration of a reasonable time, title passes. What is a reasonable time is a question of fact."

But if the facts of the case are few, simple, and clear, the courts will treat the question of reasonable time as a question of law and not submit it to the jury. *Browne & Lowe Co. vs. Potolski*, 221 App. Div. 299; *McCarty vs. National Carbonic Gas Co.*, 189 N. Y. 40, 47.

In a sale on approval, if the buyer fails to signify disapproval within a proper time, it has been said that this is not necessarily an acceptance, though it may be evidence of it. *Hunt vs. Wyman*, 100 Mass. 198, 200. But under Sub'd 2, Rule 3, Sec. 100, Pers. Prop. Law, it would result in the passing of title "unless a contrary intention appeared."

Where goods are left by one with another "on thirty days' trial," and no agreement is made that the goods are to be purchased if trial is satisfactory, no recovery for the price can be had, if the one to whom they are delivered notifies the sender, after the expiration of the thirty days, to call and take them away. Sec. 100, Rule 3, Pers. Prop. Law,

applies only where a sale has been agreed upon, subject to the test being satisfactory. *Fox vs. Proctor*, 160 App. Div. 712, *aff'd* 217 N. Y. 711.

§ 68. **Sub-Sale by Prospective Buyer Will Operate as an Approval.** A sub-sale by the prospective buyer before the time for approval has expired will operate as itself an approval and will pass title to the prospective buyer, so as to make him liable for the price and so as to give the sub-purchaser title good as against the original seller. *Neal, Clark & Neal Co. vs. Tarby*, 99 Misc. 380. In that case, a victrola was delivered on approval with option to purchase at a certain price. It was held that this constituted neither a sale nor a transfer of title until acceptance of the offer, but since the buyer had sold and delivered the victrola to another, he had done an act "inconsistent with the ownership of the seller" within the meaning of Sec. 129, Pers. Prop. Law, which provides—"the buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted thereof, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he returns the goods without intimating to the seller that he has rejected them." It was, therefore, held that, in the absence of fraud, the transaction had become a consummated sale between the parties and while the seller might sue the buyer from him for the agreed purchase price, he could not maintain an action in replevin against the one to whom the buyer had sold the instrument.

Where the transaction is a "sale on approval," the prospective buyer need not actually return them in order to prevent title passing to him, if he does not approve of the goods. All that he need do, is to notify the seller that the goods are not satisfactory, and that he desires them removed; that is a sufficient "return" to satisfy the statute. *Securities Inv. Co. vs. Maxwell*, 226 N. Y. S. 273.

§ 69. **Sale or Return.** Where the agreement of the parties is that the property shall pass to the buyer on delivery, but that he may return them if they are unsatisfactory, the transaction is known as a "sale or return," and is provided for in Sec. 100, Rule 3, Sub'd 1, Pers. Prop. Law, as follows: "When goods are delivered to the buyer 'on sale or return', or on other terms indicating an inten-

tion to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or if no time has been fixed, within a reasonable time."

Where the transaction is a "sale or return," the buyer must pay the return freight in the absence of any provision in the contract on the subject. *Lyon vs. Motley*, 9 Misc. 500. In this case, it was held that the obligation to return was not satisfied by a return to the railroad depot at the place where the buyer did business, but that he must return them to the seller's place of business and pay the return freight.

The fact that goods are not returned within the time limited by the contract is waived where the seller receives and accepts them, and raises no question as to the time of the tender back. *Ford vs. Ford Motor Co.* (1917), 179 App. Div. 472.

§ 70. Different Results of "Sale on Approval" and "Sale or Return." In a sale on trial or on approval, title and risk of loss from causes not due to the negligence of the buyer remain in the seller, during the period of approval. The prospective buyer is a bailee only and is liable only for injury to the goods occurring through his negligence. So, if the goods are destroyed while in the prospective buyer's possession, without his fault, the seller is without remedy.

But where we have a sale or return, the title passes to the buyer on shipment and he must pay the price, if the goods are damaged or destroyed whether with or without his negligence. So, it is better from the seller's standpoint to have a sale or return, rather than a sale on approval.

§ 71. Tests to Determine Whether a Transaction Is a "Sale on Approval" or a "Sale or Return." Inasmuch as parties rarely expressly stipulate in a bargain for the sale of personal property the precise moment when title is to pass, and inasmuch as the buyer's satisfaction or approval is the object to be attained in both a "sale on approval" and a "sale or return," it is sometimes difficult to determine just which transaction was intended. A contract for sale of goods often stipulates a time for the return of the goods, if they are unsatisfactory, without expressly designating the contract either a "sale on approval" or a "sale or return."

For this reason the parties' intention may not always be determined from the language they used. The use of the word "return" in the agreement does not conclusively establish a "sale or return," because that word may be used as well in an agreement under which goods are delivered for the buyer's approval. Nor does it conclusively establish a "sale on approval."

The question is one of fact in every case, not only from the language used, but from the facts and circumstances surrounding the agreement, whether the parties intended to make approval a condition, without which the property should not pass, or whether their intention was that the property should pass at once with the right to return the goods. Williston on Sales, Sec. 270. In *Atlas Shoe Co. vs. Lewis*, 202 App. Div. 244, a quantity of shoes were sold by the plaintiff to the defendant by description, under an oral understanding that the buyer might return the shoes if they proved other than as described. Since the testimony failed to reveal a conditional agreement to purchase at a future time, if the defendant like them, or if, after a trial, they satisfied his particular taste, it was held that this was not a sale "on approval, or on trial or on satisfaction" within the meaning of Sub'd 2, Rule 3, Sec. 100, but a "sale or return."

§ 72. **Sale "on Memorandum."** A sale "on memorandum" is one in which there is an option in the purchaser to take title on certain conditions, as distinguished from a contract of sale or return, where the purchaser has the option to revest the title in the seller by a return of the goods. In *Ginsberg vs. Martin*, 122 Misc. 468, the plaintiff delivered 110 suits to one Blau. The receipt or invoice which accompanied the goods bore the words "on memorandum." A few days later Blau became bankrupt and defendant was duly appointed receiver. A notice was served by the plaintiff upon the receiver that he was the owner of the goods and entitled to their possession. In disregard of this notice, the receiver disposed of them at public sale with the other assets of the bankrupt. It was held the plaintiff could recover from the receiver in an action for conversion. The Court said: "A consideration of these deliveries on memorandum by the Supreme Court of the United States in *Sturm vs. Boker*, 150 U. S. 312; *Ludvigh vs. Am. Woolen Co.*, 231 id. 522, and by the District Court for this district in *Matter of Schindler*, 158 Fed. 458, has

resulted in a clear distinction between two classes of cases. In the one a delivery to a proposed purchaser with an option in the purchaser to return the goods and thus revest title in the seller is sometimes spoken of as a contract of sale or return. The other class of cases is one in which there is an option in the purchaser to take title upon certain conditions. In the latter class title does not pass until the option is exercised, and in the meantime the title and the right to immediate possession remain in the seller. Sales on memorandum belong to this latter group, and—the title to the goods in the case at bar remained in the seller at the time of the bankruptcy.”

In *Sanette Corp. vs. Sanette Corp. of New England et al*, 132 Misc. 455, Bijur, J., writing for the Appellate Term, First Department, said, “The phrase ‘on memorandum’ in connection with the consignment or sale of goods is subject to much misunderstanding. It is assumed by many to have a definite meaning. The fact is that the memorandum itself must determine its significance. (*Matter of Schindler*, 158 Fed. 458; *Sturm vs. Boker*, 150 U. S. 312, 329; *Ginsberg vs. Martin*, 122 Misc. 468; *Jacob vs. Haefelien*, 54 App. Div. 570.) In this State there have been a number of decisions which speak of a ‘custom’ in the jewelry trade of delivering goods for inspection and possible sale to a customer of the party receiving them, with the obligation to return the goods or their proceeds as the case may be. In the first place this custom, if any, is confined, so far as the reports indicate, to the jewelry trade, and in the next place the ‘memorandum’ itself contained the terms specified. (*Marsellus, Pitt & Co. vs. Simpson*, 143 App. Div. 383; *People vs. Weber*, 130 id. 593.)”

§ 73. **Distinction Between Consignment or Agency Contract and a Sale.** It is a common practice for a manufacturer, wholesaler, or jobber, to send goods to a retailer to be sold by the latter; and the question arises whether the transaction is a contract of sale, or only a consignment or agency for sale. The question is an important one, because if the transaction is a sale, title passes to the retailer and he will be liable for the price, even though the goods are destroyed or stolen before he has had an opportunity to sell them; and he may be liable for the price, if he fails to sell them. If the transaction is merely a consignment for sale or agency, title does not pass to the retailer and loss of the goods before sale and the consequences of the failure of the goods to sell

will fall on the manufacturer, wholesaler, or jobber. Likewise, in the event of the bankruptcy of the retailer, it is important to determine whether the transaction was a sale or merely a consignment for sale or agency. If it were the former, the wholesaler cannot recover the goods from the retailer's trustee in bankruptcy but must take only a pro rata share of the assets; if it were the latter, the wholesaler can recover the goods themselves.

Owing to the practice of embodying in a contract some provisions peculiar to contracts of sale, and others peculiar to contracts of consignment or agency, it frequently becomes a difficult matter to determine whether a contract is in fact one of sale, or consignment or agency. In an excellent note on this subject in L. R. A. 1917B 626, it is said: "Much ingenuity has been employed by consignors in framing contracts to secure all the benefits, and at the same time avoid the disadvantages of contracts of sale, and also to secure the benefits and avoid the detriments of agency contracts. The result is a hybrid contract, frequently involving essential elements of both sale and consignment contracts."

The test to be applied in determining which it is, is to look at the instrument as a whole and the surrounding circumstances to get at the intent of the parties. But the intention of the parties cannot control, if to do so would violate the principles either of the law of agency or of sales. Therefore, it matters little that the parties have expressed an intention that the contract be one of consignment or agency, if it as a whole contains the essential features of a contract of sale.

The term "agent," as used in a contract of this character, or the fact that numerous words and phrases usually found in agency contracts are employed, do not have the effect of making it a contract of agency, where other provisions make it one of absolute sale. *American Seeding Mach. Co. vs. Stearns*, 109 App. Div. 192; *Roosevelt vs. Nusbaum*, 75 App. Div. 117. The word "agency" is frequently used to indicate that a merchant or dealer has the exclusive right to sell a specified article in a certain territory, when, in fact, no agency exists. The dealer in no sense represents the manufacturer, but simply buys from him in the regular course of trade, and sells the specified article to the public. The public in such case, and sometimes the dealer himself, frequently refer to this as an "agency" for the article. *Poirier Mfg. Co. vs. Kitts*, 18 N. D. 556; 120

N. W. 558. Likewise the fact that the terms "consigned" or "consignment" are used in the contract will not have the effect of changing the contract from one of sale to one of consignment, if it has otherwise the essential features of a contract of sale. In Re Master Knitting Corp., 7 Fed. (2d) 11.

"If the controlling provisions of the contract are essential or fundamental to sale contracts, and inconsistent with the essentials of an agency or consignment contract, the contract will be construed to create the relation of buyer and seller. On the other hand, if the controlling provisions are essential to an agency or consignment contract, and inconsistent with a contract of sale, the contract will be construed to create the relation of principal and agent." L. R. A. 1917 B 626, note.

§ 74. **An Agreement to Purchase Constitutes a Contract of Sale, Even Though the Purchaser Is Styled an Agent.** It is an essential or controlling feature of a contract of sale that title shall pass absolutely or conditionally from one party to the other and that there shall be a correlative obligation on the part of the other party to pay the purchase price; hence, if the contract contains such features, it will be treated as a contract of sale and not a contract of consignment or agency, even though the purchaser is styled the agent of the seller or the contract is designated by the parties one of agency or consignment. Thus in Vosbury vs. Mallory, 70 App. Div. 247, where the contract provided that one of the parties agreed to purchase an article manufactured by the other party at a certain price and to sell the same in a certain locality, and further agreed to advertise and push such sales and make such articles his leader, it was held to be one of sale and not of agency.

§ 75. **Where Consignee Is to Pay for All the Goods Sent Him Within a Certain Time Whether He Sells Them or Not, It Is a Contract of Sale and Not a Consignment or Agency Contract.** If by the terms of the agreement, it was provided that, at the end of a certain time, the retailer is to pay the sender for all goods remaining unsold, i.e., is to pay for all the goods within a certain time whether he sells them or not, it is a conditional sale and not a consignment or agency contract. Smith vs. Williams, 90 App. Div. 507; Arbuckle Bros. vs. Kirkpatrick, 98 Tenn. 221; see also Taylor vs. Fram, 252 Fed. 465. And this is so, even though it was provided that the proceeds of the resales shall belong to the consignor until full settlement by the consignee of

his indebtedness is made—such a provision being construed as a security clause only. *Weston vs. Brown*, 158 N. Y. 360; *Coweta Fertilizer Co. vs. Brown*, 163 Fed. 162. But if the consignee agrees to act as a factor or agent in selling the goods at a fixed minimum price, and that the title to the unsold goods as well as the proceeds of the goods sold shall remain in the consignor, the mere reservation in the contract of an option in the consignor to charge the consignee a designated price for the goods remaining unsold at a certain time will not make what was essentially an agency contract into one of sale. *In re Chambers*, 17 App. Div. 340. But where the consignor exercises the option and asserts against the consignee a demand for the purchase price, the title passes to the latter, even though the contract was originally one of consignment or agency. *Favorite Carriage Co. vs. Walsh*, 71 Minn. 292.

Although the requirement that the consigned goods shall be sold within a designated time, or at a fixed selling price or other requirements restricting the manner of sale by the consignee are inconsistent with the dominion over property conferred by an absolute sale thereof, still, if the consignee agrees to purchase a certain quantity of the goods, such restrictions will not prevent it from being a contract of sale, since they can be explained upon the theory that the manufacturer, in giving an exclusive agency for the sale of his goods, was desirous of exercising some control over the price at which they were to be sold and the extent to which they were to be advertised; and they do not have the effect of changing a contract of sale into one of consignment or agency. *Baldwin vs. Feder*, 135 App. Div. 97. In that case the contract appointed one party the other's sole and exclusive selling agent in the United States for certain articles for a designated period of time, the agent agreeing to purchase a certain quantity of goods each week, and not to sell the same for less than a certain price, and to account for the goods sold at a minimum price. It was held that it was a contract of sale, although there were provisions restricting the sale of the goods by the agent.

§ 76. An Agreement that the Consignee Is to Pay for Goods Sent Him as He Sells Them Is a Contract of Sale and Not An Agency or Consignment Contract. The fact that the passing of title and obligation to pay the purchase price is contingent on resale of the property by the consignee is inconsistent with the essential features of an agency or consignment contract and consistent only with a contract of

sale. Therefore, if the contract provides that the consignee is to pay a certain price for the consigned goods as he sells them, and there are no restrictions or limitations imposed upon his right to sell the goods or as to the selling price, it will be treated as one of conditional sale and not of consignment or agency (Conn vs. Chambers, 123 App. Div. 298, aff'd 195 N. Y. 538); and this is true although the contract contains a clause giving the consignee the right to return unsold goods. House vs. Beak, 141 Ill. 290; Marsh vs. Wickham, 14 Johns. 167; Capuano vs. Italian Importing Co., 89 Misc. 449.

§ 77. **If Goods Are Sent Under An Agreement Giving Consignee An Option of Buying Them At a Fixed Price, Instead of Returning Unsold Goods and Proceeds of Sold Goods, It Is a Contract of Agency and Not a Contract of Sale, Until the Option Is Exercised.** Where the contract gives the consignee or alleged agent the option to return for the consigned goods something other than the goods themselves, or the proceeds of the resale, i.e., gives him the option of buying the goods at a price fixed by the contract, such a provision is inconsistent with the essential features of a pure agency or consignment contract; for one of the fundamental rights of the consignor of goods for sale on commission is the right to have the goods returned to him upon demand before sale, subject, of course, to the payment of advances and other expenses of the consignee, and where the provisions of the contract are such as to defeat or destroy this right, as where an option is given to the consignee to do something else than return the goods or their proceeds, the transaction is not a contract for consignment or agency contract, McGaw vs. Hanway, 120 Md. 197, and is consistent only with a contract of sale. Re Wells, 140 Fed. 752. But even an option given the consignee to declare the transaction a sale has been held not to make it such, until the option is exercised. In re Thomas, 231 Fed. 513; Williston on Sales, Sec. 338.

§ 78. **An Agreement Reserving Title in the Consignor and Imposing No Obligation on Consignee Except to Remit Proceeds of Resale, Less Commission, and to Return Unsold Goods, Is a Contract of Consignment or Agency and not a Contract of Sale.** If the contract expressly reserves title in the consignor and imposes no obligation on the consignee to pay for the goods, except to remit the proceeds of resale, less commission and charges, and provides for the return of any goods remaining unsold at the end of a certain period

of time, it lacks the essential features of a contract of sale and will be treated as a contract of consignment or agency. *Weyman vs. People*, 41 Hun. 511, aff'd 62 N. Y. 623; *In re Columbus Buggy Co.*, 143 Fed. 861. The fact that the retailer may pay freight and storage charges on the goods, and guarantee the payment of the purchase price on all goods sold by him, and may make his own price to purchasers, does not prevent the transaction from being merely a bailment. *Ludvigh vs. American Woolen Co.*, 231 U. S. 522; *Lentz vs. Harrison*, 148 Ill. 598. The fact that the consignee is allowed by the contract to credit the proceeds towards an antecedent indebtedness owing him by the consignor will not make the transaction a sale to the agent, entitling the assignee for the benefit of creditors of the consignor to recover in an action for goods sold and delivered. *Collyer vs. Krakauer*, 122 App. Div. 797. Likewise, where an agent receives property to be sold, and as compensation he is to have a certain share of the proceeds of the sale, it has been held that the contract gives him no title to any part of the property received. *Wight vs. Wood*, 57 Barb. 471.

In *Bernadette, Joseph & Co. vs. Van Buren*, 212 App. Div. 702, the plaintiff delivered watches to the defendant to put them on sale, remit for the watches sold, and to return those unsold on demand. The invoice accompanying the watches contained the words "sold to E. N. Van Buren" and an itemized statement of the prices to be paid for the watches, if the defendant did not return them. The plaintiff claimed a sale of the watches to the defendant and brought an action to recover the purchase price of the watches. The defendant claims the transaction was a consignment only. It was held that the plaintiff might recover the purchase price; that the transaction constituted a "sale or return" and not a consignment. The Court said, "The intent was that of an accomplished sale. The invoice accompanying the property used the verb in the past tense; sold to E. N. Van Buren. The price of the watches as between the parties was fixed. Defendant could sell them at any price he wished or give them away and was only answerable to plaintiff for the price established as between themselves. He might sell or return at his option any or all of them. The contract was clearly within the statute above quoted." Sec. 100, Rule 3, Sub'd 1, Pers. Prop. Law. Accordingly, the title to the watches was in the defendant while they were in his possession, and the loss by larceny fell on him.

CHAPTER VII.

TRANSFER OF TITLE—SPECIFIC GOODS.

§ 79. Importance of Determining When Title Passes. If title has passed, the risk of accidental loss or damage rests upon the buyer. If title has not passed, the risk still remains with the seller. Again, if title has passed to the buyer, his creditors may seize the goods. Obviously they cannot do so unless the title has passed. Conversely, if the title has passed, the seller's creditors can make no valid seizure of the goods. If title has passed, the buyer may transfer his title to a sub-purchaser and give him an absolute title. If title has passed and the buyer becomes bankrupt, his trustee in bankruptcy is entitled to the goods. If title has not passed, and the seller becomes bankrupt, his trustee in bankruptcy is entitled to the goods.

§ 80. General Rule As to When Title Passes. Title does not always pass at the time the bargain is made. It depends on the intention of the parties when title passes. Title passes when the parties intend it shall pass. If the parties intended title to pass at the time of the bargain, it will, although delivery has not been made nor the price paid. The passing of title does not depend upon the delivery of the goods nor the payment of the price, but on the intention of the parties. These general principles are embodied in Sec. 99 Pers. Prop. Law, which provides— "1. Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

"2. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case."

The following section, (Sec. 100, Pers. Prop. Law) sets forth a number of rules for ascertaining the intention of the parties as to when title shall pass. It provides:

"Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

“Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

“Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.”

In other words, in determining whether title has passed, we are not concerned with the question as to whether delivery has been made or the price paid, but we are concerned with the questions as to (1) *whether the goods are specific at the time of the bargain*, and (2) *whether the goods are in a deliverable condition at that time*. If they are, then in the absence of any provision in the contract to the contrary, it will be presumed that the parties intended title to pass at the time of the bargain.

§ 81. **Evidence As to Intention of Parties.** The following have been suggested as additional indications of the intent of the parties as to title passing:

(1) If at the time the bargain is made, the buyer pays the price or the approximate price of the goods, it is some evidence that the parties regarded title as passing then—because buyers do not usually pay the price without intending to become the owners of the goods at once.

(2) If at the time of the bargain, the buyer, instead of paying the price or the approximate price, pays down more than enough to compensate the seller by way of damages in case he, the buyer, fails to perform his part of the contract, it is some evidence that the parties intended title to pass at the time of the bargain; it is evidence of good faith and intention of carrying out the contract.

(3) Where the buyer can demand delivery of the goods at once or at any time without then paying for them, it is some evidence that title passed at the time of the bargain.

(4) If at the time the bargain is made, the seller expressly agrees to hold the goods free of storage until the buyer comes and takes them away, or if the seller charges the buyer storage, it shows that the parties considered that title had passed at the time of the bargain, because sellers do not usually charge storage on their own property.

(5) If it is one of the terms of the bargain that the

seller is to procure and maintain insurance on the goods until called for or delivered, such insurance to be for account of the buyer, it is some evidence that the parties regarded title as having passed at the time of the bargain. *Berkshire Cotton Mfg. Co. vs. Cohen*, 236 N. Y. 364.

(6) If the contract stipulates that the goods shall be at the risk of the buyer, although still in the seller's possession, or that of his agent, it is some evidence that the parties regarded title as having passed at the time of the bargain. The buyer usually does not want to assume the risk until he has the title. So when a buyer agrees to assume the risk from the time of the bargain, it shows he intended title to pass to him at the time of the bargain. He certainly does not intend to assume the risk of the seller's goods. Risk of loss or deterioration is a natural incident of ownership. However, since there is no rule of law which prevents one who is not the owner from agreeing to bear the risk, this suggestion is not a conclusive indication of the intention of the parties that title shall pass.

(7) Where a seller writes "accepted" on a delivery order signed by the buyer and presented by a sub-purchaser, it is some evidence that the parties regarded title as having passed. It shows that the seller considers himself as a bailee only and no longer the owner of the goods, and that he holds goods belonging to the buyer which he is ready to deliver to the buyer's sub-purchaser.

§ 82. **What Are Specific or Ascertained Goods?** If the bargain sufficiently describes the goods to enable them to be identified, they are specific. In *Hansen vs. Meyer*, 6 East 614, there was a contract to sell all the starch belonging to the defendant which was then lying in a certain warehouse, at a certain price per hundredweight. The starch was in papers, and it was arranged that the seller was to give the buyers a note addressed to the warehouseman authorizing him to weigh and deliver the starch to the buyers. The defendant gave the buyers such a note, which the buyers presented to the warehouseman who weighed and delivered to them a part of the starch. The buyers then became bankrupt and thereafter the defendant took away from the warehouse the balance of the starch that had not been weighed and delivered. The buyers' trustee in bankruptcy claimed that title had passed to all of the starch and brought an action of trover to recover the value of the starch which the defendant had taken away from the ware-

house. It was held that title had not passed to that starch which had not been weighed and delivered, and, therefore, judgment was given to the defendant. It should be observed in that case that the goods were specific at the time of the bargain. The quantity was not named in the contract, except that it was all of the starch belonging to the seller that lay in that warehouse. But the quantity was ascertained—it was all the starch of the seller in that warehouse, whatever it proved to be in amount. The quantity does not need to be named in units of weight or measurement, in order for the goods to be specific. The starch was also in a deliverable state at the time of the bargain, as it was done up in paper bags. Nevertheless, the Court said that as weighing was necessary to determine the price and as the buyers were not authorized to remove the starch from the warehouse until it had been weighed and the price determined, title to the starch could not pass until that had been done. But today it is recognized everywhere that there is no impossibility to title passing to specific goods in a deliverable condition merely because the price has not yet been determined. Indeed, Sec. 100 Rule 1, Pers. Prop. Law, provides:

“Where there is an unconditional contract to sell specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment, or the time of delivery, or both be postponed.”

The rule in *Hansen vs. Meyer*, *supra*, would not be followed in New York today. In fact, prior to the adoption of the Sales Act in 1911, the New York Courts held that weighing is no longer essential to the passing of title except where the weighing is necessary to establish the identity of the goods. *Sanger vs. Waterbury*, 116 N. Y. 371.

In *Turley vs. Bates*, 2 H. & C. 200, the defendant agreed to buy and take away an entire heap of fire-clay, then stocked on the plaintiff's land, at a certain price. The defendant was at his own expense to load and cart it away and it was to be weighed at a weighing machine belonging to one Johnson, which was on the road from the plaintiff's land to the defendant's premises. The buyer was to pay for the weighing. The defendant carted away a part of the clay which was weighed at Johnson's machine but then ceased to cart away the balance. The plaintiff brought an action for goods bargained and sold, in which he sought to recover the

price for the clay not removed. The defendant had paid for the part removed. The plaintiff argued that as the goods were specific at the time of the bargain and as nothing remained to be done by the seller, title to the entire heap passed at the time the contract was made, even though all the clay had not been removed and weighed, and hence that the defendant should also pay for the clay not removed. The defendant argued that the title to the clay could not pass till the clay was weighed at Johnson's machine and relied on the case of Hansen vs. Meyer, *supra*, in support of his argument. The plaintiff obtained a verdict for the contract price of the clay not removed. It was held on appeal that the verdict should stand, as it was the intention of the parties that the property in the whole heap should pass, notwithstanding the clay was to be weighed at Johnson's machine. It should be observed that *the buyer alone* was to do the weighing and the Court took this opportunity to break away from the rule in Hansen vs. Meyer, *supra*, to this extent, that if the buyer alone is to do that which determines the price, title does pass; but if the seller is to do what remains to be done, or to take part in doing what remains to be done, presumptively title does not pass until that is done.

In Sanger vs. Waterbury, 116 N. Y. 371, the plaintiff had sold to Huston and Company 238 bags of coffee on credit. These bags, although piled with other bags in the plaintiff's warehouse, were identified in the bill of sale by certain definite marks on the bags themselves. Huston and Company pledged these bags of coffee to the defendant as security for a loan. Upon Huston and Company's default in paying the price, the plaintiff brought an action of replevin to recover possession of the bags of coffee from the defendant, claiming that title had not passed to Huston and Company as, since the coffee had to be weighed in order to ascertain the price, title could not pass until that was done. The Court held that title had passed and hence the plaintiff was without the necessary title to maintain an action of replevin; and so rendered a judgment for the defendant. The rule was laid down that weighing is not a condition precedent to title passing, unless the weighing is necessary to identify the goods. It should be observed that the goods were sufficiently identified in the contract itself. Nothing remained to be done to identify them, although they were stored with other bags at the time of the bargain.

The weighing was not necessary in order to determine

whether there would be a sale or not. Whether the 238 bags should prove to weigh more or less than the parties anticipated was of no consequence, as Huston and Company had agreed to buy the entire 238 bags whatever they might weigh, i.e., at a price of so much per unit of weight whatever they might weigh. The weighing was necessary only to determine how much the buyer should pay, not whether he should pay.

In *Barber vs. Andrews*, 29 R. I. 51, there was an agreement to sell twenty tons of hay in the seller's barn and the price was paid. There was a large quantity of hay in the barn and it was agreed that the buyer might leave the twenty tons which he had bought with the rest; but it was further agreed that 500 cubic feet should be conclusively estimated as a ton, and that the 10,000 cubic feet belonging to the buyer should be ascertained by measuring from the east end of the mow, taking the entire width of the barn. It was held that the property had passed, and an officer who seized the hay as the property of the seller was held liable for conversion. It should be noted that the goods sold were specific at the time of the bargain, although still unseparated from the larger mass, because the contract identified the hay sold as a certain definite part of the mow; i.e., the 10,000 cubic feet measuring from the east end entirely across the mow.

From the foregoing cases, it would appear that goods are specific even though the quantity is not named in units of weight or measurement, if they are described in the contract of sale sufficiently to be identified, even though they are still part of a larger mass of the same kind and quality of goods, and even though the goods are to be weighed before delivery, if the weighing is to determine only the price and not the identity of the goods.

Under a contract, delivery of sugar was to be made at a regular Cuban shipping port; the buyer was to load it on vessels supplied by himself and provide insurance. Payment was to be made on delivery of documents. It was held title passed when the sugar was delivered to the carrier at the Cuban port, although the net weight and sugar content was to be determined at the port of discharge for the purpose of finally arranging the account between the parties. *Perkins vs. Minford*, 235 N. Y. 301.

§ 83. **Something to Be Done by the Seller to Put the Goods Into a Deliverable Condition.** It is a natural infer-

ence that the parties do not intend an immediate transfer of title, if the seller has still to do work upon the goods before they will be in the deliverable condition contemplated by the bargain. In an early English case, *Rugg vs. Minett*, 11 East 210, the plaintiff agreed to buy a certain quantity of turpentine of the defendant at a certain price, the defendant to put the turpentine into casks before delivery. After the defendant had put part of the turpentine into casks, it was all destroyed by fire. The plaintiff had paid for all the turpentine and sued to recover the purchase price he had paid. It was held that with respect to the casks filled up, as nothing further remained to be done by the seller to put the goods into a deliverable condition, title had passed as to the turpentine in them and they were at the buyer's risk and the buyer could not recover the purchase price paid for the turpentine in the casks; but as to the turpentine which remained to be put into casks, title to it had not passed to the buyer and he could recover that part of the money he had paid which covered that turpentine. That case raised another presumption that, if something remains to be done by the seller to put the goods into a deliverable condition, title is not intended to pass until then. This presumption finds expression in Sec. 100, Rule 2, Pers. Prop. Law, which reads—"Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done."

When the seller has put the goods into a deliverable state, title will automatically pass without any further expression of assent by the parties. "As by the terms of the bargain, the seller is to do something further to the goods, and as the property would presumably pass at once were it not for this circumstance, the buyer must be assumed to assent not only to the goods being prepared as the bargain provides, but also that the property shall pass when they are so prepared." Williston on Sales, Sec. 265.

The rule that where something remains to be done by the seller to put the goods into a deliverable state, title does not pass until then is but one of presumption and if the parties clearly manifest their intention that the title shall pass before the seller has put the goods into a deliverable state, their purpose will be effectuated. For example, if in spite of the fact that the seller is to put the goods into a deliverable state, the buyer at the time of the

bargain pays down the whole purchase price or approximately the whole price or more than enough to compensate the seller by way of damages in case he, the buyer, fails to perform his part of the contract, it will be some evidence that the parties intended title to pass at the time of the bargain, because buyers do not usually pay the price without intending to become the owners of the goods at once. "But this reasoning is inapplicable if the payment is small and apparently intended merely to bind the bargain." Williston on Sales, Sec. 265.

In Sec. 124, Sub'd. 5, Pers. Prop. Law, it is provided—
"Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller."

CHAPTER VIII.

TRANSFER OF TITLE—UNASCERTAINED GOODS.

§ 84. **General Rule—Specification of the Goods by Subsequent Appropriation Necessary.** ~~If the goods are not specific at the time of the bargain, title cannot pass at that time. Some subsequent act by one of the parties, with the assent of the other, is necessary, appropriating the goods to the contract, before title can pass. This general rule finds expression in Sec. 100, Rule 4, Sub'd 1, Pers. Prop. Law, as follows: "Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied and may be given either before or after the appropriation is made."~~ *not*

§ 85. **What Acts Will Be Deemed Acts of Appropriation.** No act of either party will be deemed an act of appropriation, unless it is assented to as such by the other party. The buyer rarely, if ever, expresses his consent to an appropriation in definite words. Therefore, his assent, if any, must be inferred generally from the terms and circumstances of the bargain. A correct judgment in regard to the question presented can best be obtained by an examination of the leading decisions upon the subject. Williston on Sales, Sec. 274.

Sec. 100, Rule 4, Sub'd 1, Pers. Prop. Law, does not attempt to define an act of appropriation; that is left to the facts and circumstances of each case.

§ 86. **In the Absence of any Agreement, When Does Title Pass to An Article not in Existence at Time Contract Is Made But to Be Manufactured and Delivered to the Buyer.** If the article sold is not in existence at the time of the bargain, some act other than the mere completion of the article will be necessary, appropriating the article to the contract, before title can pass; and it will be necessary that such act of appropriation should be assented to by both

parties. A discussion of a few of the leading cases may illustrate what act or acts will be deemed an appropriation to the contract.

In *Woods vs. Russell*, 5 B. & Ald., 942, the seller contracted to build a ship, the price to be paid in four installments. Before the vessel was completed, the seller signed a certificate to enable the buyer to register the ship in his own name. To make such registry, it was necessary for the buyer to make oath that he was the owner. At the time this certificate was given by the seller, the buyer took possession of the ship. He also took possession of a rudder and some cordage in the seller's shipyard that had been bought and measured for the ship but not attached to the ship. Before the vessel was completed, the seller became bankrupt, and the plaintiff, his trustee in bankruptcy, sued the buyer *in trover*, i. e., for the value, as if there had been a wrongful taking. It was held that the plaintiff could not recover the value of the ship, nor the rudder and cordage, for title to the same had passed to the buyer at the time of the registry of the ship as the buyer's property, that having been done with the seller's assent. In speaking of this case, Williston (Sales, Sec. 275) says: "On this view the appropriation seems to have been made by the buyer when he registered the vessel as his. Perhaps the view would be quite as tenable that the property passed when the seller signed the certificate to enable the buyer to register the vessel as his." The Court also suggested that the payment of the installments appropriated to the buyer the very ship as the work progressed, so as to vest title in that ship in the buyer. On this point, Williston (Sales, Sec. 275) says: "The rule thus stated is, however, an artificial one. It is obvious that the property in the vessel can hardly pass to the buyer in pieces corresponding to the installments paid. "This would involve during the progress of the work a divided ownership, though the line of division of the property in the nature of the case could not be clear. . . . If title to the vessel in its incomplete state passes to the buyer when the first installment of the price is paid, the materials thereafter added would pass to the buyer by accession as they are added to the vessel."

The American Courts do not take the view that where a ship or other article of personal property is to be built and paid for by installments, title to as much of the work as is then completed passes at the payment of each install-

ment. *Andrews vs. Durant*, 11 N. Y. 35. Payment of an installment as the work progresses is not such an act of appropriation by the buyer, assented to by the seller, as to pass title, because it could only pass title piece-meal, as the work progresses and that is not what the buyer wants. In the case of the building of a house, title passes piece-meal, i.e., by accession, but in the case of the building of a ship, it generally does not. This is for the reason that materials built into a house become affixed to the realty and pass by accession to something already owned by the buyer. In the case of the building of a ship, the builder does not affix material to something to which the buyer already has title.

Upon the point in the case of *Woods vs. Russell*, *supra*, that the title to the rudder and cordage passed, the case is clearly wrong, for nothing seems to have been done indicating an intention to make a transfer of title to those articles before they were attached to the vessel, and the decision upon this point has been overruled. See *Wood vs. Bell*, 5 E. & B. 772.

In *Johnson vs. Hunt*, 11 Wend. (N. Y.) 135, the defendant agreed to build a house for the plaintiff who was to pay for it by installments. The defendant was to procure the necessary materials. He worked plank belonging to him into columns for the piazza of the house and did this on the plaintiff's premises and left them there. Subsequently the defendant abandoned the work on the plaintiff's house and about two weeks later returned and took and carried away the columns. The plaintiff sued to recover them. It was held that title to the columns had not passed to the plaintiff. The Court said that the materials were purchased by the defendant, were his own, and at his risk. The fact that such materials were intended for the plaintiff's house or brought on the plaintiff's lot did not change the property. The defendant might sell it again, and purchase other materials to use in the plaintiff's house, and if he procured such as the contract required, the plaintiff could not complain. Where a house is to be built and paid for by installments at agreed stages in the work, title to as much as is then finished passes by accession, but as to materials made and measured for the house and brought upon the premises, title to them remains in the builder until they are affixed to the house.

In *Andrews vs. Durant*, 11 N. Y. 35, the seller agreed to build a barge for the buyer, payment to be by installments as the work progressed. Shortly after the barge had

been planked and caulked and the buyer had paid the third installment, the builders went into bankruptcy and assigned the unfinished barge to the plaintiffs as trustees for the benefit of their creditors. The defendants, the buyers, having obtained possession of the barge, the seller's assignee, the plaintiffs, demanded its return, but the defendants would not give it up. The seller's trustee in bankruptcy sued in trover. It was held that he could recover, as title had not passed. The Court said: "In general, a contract for the building of a vessel or other thing, not yet in existence, does not vest any property in the party for whom it is agreed to be constructed during the progress of the work, nor until it is finished and delivered, or at least ready for delivery and approved by such party. And the law is the same, though it be agreed that payment shall be made to the builder during the progress of the work, and such payments are made accordingly." It should be noted that in the Andrews case, *supra*, the contract provided that the barge was to be built according to the direction of the buyer's superintendent, who should have the privilege of rejecting any timber he might think not suitable, and object to any work not done in a workmanlike manner. As to the effect of this on title passing, the Court said:

"In the case before us, it cannot be denied but that the barge, as fast as its several parts were finished with the approval of the superintendent, became specifically appropriated to the fulfillment of this contract, so that Bridger & Co. could not have fulfilled their agreement with the defendants in any other way than by completing and delivering that identical boat. This results from the consideration that the Superintendent could not be called upon to inspect and approve the work and materials of another barge, after having performed that duty as to one; so that the contract would be broken up unless it applied itself to this vessel. But it is clear that this circumstance alone does not operate to transfer the title."

It is obvious that the parties never intended that as soon as the first payment had become payable and had been paid, the title to the unfinished barge should vest in the defendants, so that thereafter it should be at their risk as to accidents and be liable for their debts. The purpose of having the buyer's superintendent look over the work as it progressed was not to pass title to such work as he approved of, but to see that the work is done according to the specifications, so that when the vessel is completed the buyer

will know whether to accept it in fulfillment of the contract. But inspection by the buyer or buyer's agent after completion, if it results in approval, may amount to such an act of appropriation as to pass title at that time.

In *Atkinson vs. Bell*, 8 B. & C. 277, the buyer ordered machines of the seller, to be made according to a special order. They were made under the supervision of an agent of the buyer and altered in accordance with his directions. They were then packed in boxes also by his directions. The seller then wrote the buyer asking for shipping directions, which were never sent, and the buyer refused to take the machines. It was held that the property had never passed. This case has been criticized on the ground that the boxing of the machines in accordance with directions from the buyer's agent was a sufficient appropriation, assented to by both parties, to transfer the title, and this criticism seems just. *Williston on Sales*, Sec. 275.

In *Wilkins vs. Bromhead*, 6 M. & G. 963, the seller contracted to build a portable greenhouse for the plaintiff and did so, and notified the plaintiff of the completion and requested payment of the price. The plaintiff sent the money and requested the seller to keep the greenhouse until he was ready for it. On the bankruptcy of the seller, it was held that the property had passed. The payment of the price was an act of appropriation by the buyer, assented to by the seller, which passed title as of that time.

§ 87. Rule Where Buyer, Instead of Seller, Is to Furnish All or Major Portion of Material, out of which Article Is to Be Made. ^{Here} In the cases discussed in the preceding section, the seller was to furnish all or the major part of the material out of which the article was to be made. Where the buyer furnishes all the material upon which the seller is to do the work, it is not properly speaking a sale at all. Instead, the bargain is one for work, labor, and services and the ownership of the goods is at the outset and throughout the process of manufacture, in the so-called buyer.

Where the buyer and seller both furnish materials out of which the article is made, we must inquire—"do the parties intend that the materials furnished by the buyer shall, by accession, become the property of the seller when added to the materials furnished by the latter, in which case the property will not pass until the completed article is appropriated to the buyer; or, do the parties intend that the materials furnished by the seller shall by accession to the

goods furnished by the buyer become at once the latter's property? The proportion of goods furnished by one party or the other furnishes the best evidence of their intention in the absence of a direct expression of it." Williston on Sales, Sec. 276. In *West Jersey R.R. Co. vs. Trenton Car Works*, 32 N. J. L. 517, the plaintiff ordered a railway car and furnished the plush and reps for the seats, but the bulk of the materials were furnished by the manufacturer. It was held that the property in the car remained in the manufacturer until delivery or appropriation. In *re Nonmagnetic Watch Co.*, 89 Hun. 196, the buyer of watches manufactured for him by the seller, furnished the hair springs and balances, but it was held that the property did not vest in the buyer prior to delivery or appropriation.

§ 88. **Setting the Goods Aside and Labelling Them for the Buyer as an Act of Appropriation.** In *Tift vs. Wight & Weslosky Co.*, 113 Ga. 681, a customer of a merchant agreed to purchase a certain quantity of oats at a given price. In accordance with an agreement, the oats were weighed, set aside, the customer's name placed on them, and the price charged to him. It was held to be a complete sale when this had been done.

In *Mitchell vs. Le Clair*, 165 Mass. 308, the seller offered the buyer a lot of butter at a certain price, if accepted before twelve o'clock next day. The buyer gave a telegraphic acceptance within that time. The seller, thereupon, weighed some butter, set it apart, and marked each tub to indicate that it was appropriated to the buyer. He then sent a bill to the buyer marked "cash on demand." It was held that the sale was thereupon completed. It will be noticed that in this case the buyer's assent to the appropriation was given prior to the appropriation and that the goods remained wholly within the control of the seller.

In *Rohde vs. Thwaites*, 6 B. & C. 388, the buyer bought twenty hogsheads from a much larger quantity of sugar, which was in the seller's warehouse on the floor. Sixteen of the hogsheads were filled and the seller notified the buyer that they were ready and requested him to take them away. He said that he would take them away as soon as he could. It was held that the property passed to the sixteen hogsheads by the subsequent assent of the buyer to the appropriation made by the seller.

In *Berkshire Cotton Mfg. Co. vs. Cohen*, 236 N. Y. 364 the seller contracted to sell to the buyer 100 bales of cotton.

Part of the cotton was already made up into bales and in a deliverable state. The remainder was in the seller's possession and had only to be sorted and baled. The place of delivery was the seller's place of business. The buyer was to send his own truckman to call for the goods. The seller sorted and baled the remainder of the cotton and all the bales were set aside and labeled, awaiting the call of the buyer's truckman. He called at a time when no delivery could be made, and refusing to wait a few minutes, he went away without the bales. The seller brought an action for goods sold and delivered. It was held that the seller could maintain an action for goods sold and delivered. The setting aside of the bales and labeling them for the buyer was an act of appropriation and was assented to by the buyer, as shown by the fact that upon receiving notice that that had been done, he sent his truckman to call for the goods, without inspection. Title had, therefore, passed and the mere fact that the truckman called at a time when no delivery could be made and refused to wait a few minutes, did not change the result. Furthermore, the contract provided that the cotton was to be held covered by insurance, until called for. If the buyer did not intend title to pass, until the bales were delivered to his truckman, why did he insert such a provision in the contract? A loss of the bales by fire in the seller's warehouse would not affect the buyer, if the title to the cotton were to remain in the seller, until the bales were called for. The insurance clause in the contract is additional evidence to show that the buyer intended title to pass to him as soon as the cotton was baled and set aside for him in the seller's warehouse.

In *Taylor vs. Kurzrock*, 214 App. Div. 308, the defendant ordered goods by sample to be delivered at specified dates at the buyer's place of business. Subsequently, he changed the agreement by directing the seller to hold the goods until the buyer gave him notice when and where to ship the goods. By this change in the contract, the goods became deliverable at the seller's place. The seller, thereupon, selected the goods, packed them, and put them aside for the buyer. These acts constituted an appropriation of the goods to the contract with the buyer's assent, and title passed immediately on notification.

§ 89. **Act of Putting Goods in Deliverable Condition May Constitute Act of Appropriation.** In *Hubbard vs. Roch-away Lunch Co.*, 225 N. Y. S. 638, the seller agreed to de-

X liver to the buyer 12,000 dozen cold storage eggs at 45c per dozen, to be candled and delivered as ordered between Sept. 20, 1925 and Jan. 1, 1926. The buyer ordered a part but then refused to order or accept the balance. It was held that the seller could not recover the price for the balance, as title had not been passed. It should be observed that the contract provided that the plaintiff must candle the eggs as ordered for delivery. The evidence showed that candling of cold storage eggs must be done to determine whether they are fit for delivery. The candling of the eggs was necessary under the terms of the contract to identify the eggs to be delivered and to be paid for, and to put the eggs when ordered in a deliverable state. Until that testing was done, the eggs referred to in the contract could not be identified or selected from a larger lot, or ascertained or appropriated to the contract.

Here § 90. **Buyer's Assent to Appropriation May Be Shown by Accepting and Retaining Invoices.** Where the seller put the goods in a deliverable state and sent invoices which were retained by the buyer for several weeks, it was held that he had assented to the appropriation by accepting and retaining the invoices. *Whitman Co. vs. Witcombe*, 123 Misc. 117.

§ 91. **Although Buyer's Assent to the Appropriation May Have Been Given in Advance, Title Does Not Pass Until the Appropriation Is Actually Made.** In *Byrne vs. Hulett Co.*, 198 N. Y. S. 232, the plaintiff sued in conversion for the value of a car. He claimed that the defendant, after selling a certain car to him, had sold the same car to another person. The defendant proved that it was a sale by description and that he had sold a car to plaintiff by a bill of sale describing the car. He had thereupon put a car aside for the plaintiff, but by mistake the car so set apart was not the car described in the bill of sale. After discovery of the mistake, he sold the car to another party. The car which he actually had intended to sell to the plaintiff, was never appropriated to the plaintiff's contract. It was held that the plaintiff could not sue in conversion, because he never obtained title to the car described in the bill of sale, nor to the car which had erroneously been set aside for him.

§ 92. **Effect of Seller's Depositing Goods in Receptacles or Containers Sent by Buyer.** It sometimes happens that where the goods are unascertained at the time of the

bargain, because they are then still part of a larger mass, the buyer sends his own receptacles or containers into which the seller is to place the goods as they are separated from the larger mass. The question arises whether title passes as each receptacle is filled or not until all are filled.

The two leading cases on this subject are *Aldridge vs. Johnson*, 7 E. & B. 885, and *Langton vs. Higgins*, 4 H. & N. 402. In the first, the plaintiff agreed to buy from the seller 100 quarters of barley out of the bulk which he had inspected and approved in the seller's granary. The plaintiff paid the price and sent his own sacks which the seller was to fill, take to the railway, and place on trucks free of charge. The plaintiff sent 200 sacks and the seller filled 155 of them, but could not succeed in obtaining trucks. The plaintiff requested that the 155 sacks should be sent to him. But the seller finding himself on the eve of bankruptcy, emptied the barley out of the sacks into the bulk again. The plaintiff sues the seller's assignee in bankruptcy for the value of the entire 100 quarters of barley. It was held that the plaintiff could recover only the value of the barley put in the 155 sacks; as to the rest, judgment should be for the defendant. The Court said that title to what remained in the bulk never passed to the plaintiff, but title to as much of the barley as had been put into the 155 sacks had passed to the plaintiff. Title to each sackful passed to the buyer as the seller put the barley into the sack, because that was an act of appropriation on the seller's part, to which the buyer had assented by sending the sacks to him for that purpose. The buyer's assent to the act of appropriation may occur either before or after the act of appropriation. It should be noted, however, that the buyer had inspected and approved of the barley in bulk. He had sent his own sacks to be filled out of the bulk, and upon being informed that 155 sacks had been filled, requested that they be sent him. These facts show sufficient assent on his part to the appropriation by the seller, without having to rely upon the bare fact that the seller had put the barley into the buyer's sacks. But Williston says, "It does not appear, however, from the report of the case that the buyer was ever informed that only 155 of the sacks had been filled, and the demands that he made for the performance of the contract seem to have been demands for all the grain to which he was entitled—a larger amount than that actually put in the sacks." Williston on Sales, Sec. 277.

This decision was followed by *Langton vs. Higgins*, supra, in which the seller agreed to sell to the buyer all the oil of peppermint made from the year's crop of peppermint raised by the seller. The buyer made a considerable advance payment to the seller, in accordance with the custom of dealing between the parties; and likewise according to that custom, the buyer sent to the seller the bottles to be filled with the oil. After the bottles were all filled, they were wrongfully disposed of to a third person, whom the original buyer sued in detinue and trover. A verdict for the plaintiff was directed and it was held proper. Lord Bramwell, who delivered the principal opinion, said: "In all reason when a vendee sends his ship, or cart, or cask, or bottle to the vendor and he puts the article sold into it, that is a delivery to the vendee." It should be observed that in that case all the oil was put into the plaintiff's bottles, so that the question of partial appropriation was not actually involved, but Bramwell said in regard to this: "Again, suppose only a portion of the oil had been put into the bottles, inasmuch as the plaintiff was not bound to take a part only would the property vest? *Aldridge vs. Johnson* is an authority on that point. It may be that the plaintiff would have the option of refusing to take a part only of the oil or of accepting it, but that right is not inconsistent with the property vesting at his election. It might vest in him conclusively, but at all events it would vest when he exercised his option."

It is to be noticed in the case of *Langton vs. Higgins*, supra, that Bramwell claims that there had been delivery to the buyer, not merely appropriation. In the previous case of *Aldridge vs. Johnson*, delivery was not mentioned. "It seems clear that where actual delivery of part of the goods is made to the buyer, assuming that the word 'delivery' implies some knowledge or assent on the part of himself or his agent to receive the goods, the natural inference is that the property passes. If for instance a man should ask a fruit dealer to pick out a dozen apples for him, and the fruit dealer handed the apples over to the buyer, one by one, as they were picked out, the presumption would be that the property in each apple separately passed at once. On the other hand, if the fruit dealer set them aside, one by one, as he picked them out, still retaining possession of them, no such inference would be proper. Although in both cases each apple when it was set aside was intended by the seller to form one of the lot which was the subject of the order, in the latter case it cannot be assumed that the seller intended

to appropriate each apple separately, and still less can it be assumed that the buyer assented to take the ownership of each apple separately; the original agreement for the lot as a whole has never been modified." Williston on Sales, Sec. 277.

In *Stewart vs. Henningsen Produce Co.*, 88 Kans. 521, 129 Pac. 181, the Court held broadly, where the goods contracted for are an entire quantity and there is nothing in the circumstances of the case to indicate a contrary intention, the risk of loss attaches to the quantity of goods only when completed and ready for delivery, and not to each separate installment as completed and ready for delivery. The Court said: "A recent case in point upon the entirety of the contract is *Walti vs. Gaba*, 160 Cal. 324, 116 Pac. 963. There the agreement was for the sale of clipped and unclipped wool, the spring wool of 1906 at 18 cents per pound; the fall wool of 1905 at 14 cents. The fall wool, being stored, it was to be delivered at a railway station with the spring wool when that was clipped. A deposit of \$250 was made on the sale. The stored wool was destroyed by fire before the spring wool was clipped from the backs of the sheep. The "question was which party sustained the loss. The Court held the contract to be entire and that no title to any part of the wool passed." See also *Pope vs. Porter*, 102 N. Y. 266.

After a review of the authorities in reference to entire and indivisible contracts, Williston (Sales, Sec. 277) says: "These cases seem to warrant the rule that mere appropriation of part does not warrant the inference that the property was intended to pass to that part, but if delivery of part is made to the buyer, the inference is justified that the property was intended to pass."

Ordinarily a buyer does not intend nor want title to pass piece-meal. He does not want to become responsible for only part of what he orders, but wants to bear the risk as well as the benefit of the whole or none. Of course, if parties show an intention that title pass in parts, then it will. Is such an intention shown where the buyer sends his own receptacles? Probably not, for if title passes to each sackful as it is filled, then the risk of its loss falls on the buyer at once, although as yet title has not passed to all he bargained for, and this the buyer ordinarily does not intend shall be. He does not want to assume the risk of loss as to a part, until the title to the whole is in him.

In *Procter & Gamble Co. vs. Peters*, 233 N. Y. 97, there was a contract to purchase all of a certain kind of fish oil that the seller produced at his factory for a given period at a certain price, except 6,000 barrels which were to go to another customer. The buyer was to send its own tank cars to receive the oil at the seller's factory. The evidence showed the following process of manufacture; after the oil was pressed from the fish, it was cooked and permitted to stand for several days in settling tanks, until it became clear and then it was pumped into storage tanks, from which it was pumped out for shipment directly into tank cars. Two of the plaintiff's tank cars, after they were filled, were diverted by the seller to Swift & Co., and the plaintiff brought an action for conversion. A majority of the Appellate Division held that the plaintiff was entitled to recover on the ground that when the oil was pumped into the storage tanks the title passed to the plaintiff. The Court of Appeals reversed the Appellate Division and held that title did not pass when the oil was pumped into the storage tanks; that was no appropriation of the oil to this contract, because oil intended for the other customer was pumped into the storage tanks at the same time. However, they held that when the seller pumped the oil from the storage tanks into the tank cars supplied by the plaintiff, that was an appropriation of the oil to this contract and a delivery to the plaintiff.

§ 93. **Fungible Goods.** Not infrequently parties purport to make a present sale and purchase of a definite number of units of weight or measurement of a mass or bulk of goods the particles of which are all alike; e. g., a sale of ten tons of oil out of forty tons in one cistern and at the time of the bargain the ten tons are not drawn off from the cistern. "In the nature of the case it is impossible to transfer title to something wholly unspecified. Ownership necessarily implies specific property as the subject of ownership. It is, therefore, impossible literally to own ten tons of oil out of forty tons when all is contained in one cistern. It must be conceded that this reasoning is sound so far as concerns the ownership of ten tons, as such. If ten tons really were owned by the buyer, it would be fair to inquire which ten tons he owned, an inquiry which could not be answered satisfactorily. If the answer 'any ten tons' were made, the answer itself would be an assumption that title had not passed to a specific ten tons. The matter may be tested by supposing the destruction of the property. If the buyer actually

owns ten tons, that ten tons should be subject to the risk of loss and chance of destruction, apart from the oil in the cistern belonging to others; but of course, if ten tons of the oil in the cistern were destroyed, neither party would admit that it was his ten tons, and it would be impossible to prove that it was." Williston on Sales, Sec. 149.

Title to ten tons as such cannot pass to the buyer at the time of the agreement because you cannot point to any ten tons and say those are the buyer's. It could not be a sale of a specific ten tons as such because the particular ten tons were not specified—they were all mixed up with the other thirty tons in a homogeneous mass. But it does not violate the intention of the parties to say that title passed to an undivided fraction of the mass, and that is what American Courts hold. All that the buyer got was title to an undivided one-quarter of the oil in the cistern. If there is any leakage he will have to stand one-quarter of the loss and the seller three-quarters of the loss; the buyer and the seller will have to bear the loss proportionately. If one-quarter of the oil leaked out, then the buyer should get only one-quarter of the remainder; i. e., $7\frac{1}{2}$ tons when time for delivery came where there was originally forty tons of oil all belonging to the seller in the cistern. Though it is impossible to transfer the title to ten tons of oil as such where there are forty tons in the cistern, it is perfectly possible to make the buyer tenant in common with the seller of the whole mass, the buyer becoming owner of a fourth share and the seller remaining owner of three-fourths.

This fairly represents the intention of the parties. They intend that the goods shall be kept together for the present, and, nevertheless, that title shall pass to a part. Being tenants in common of the mass, each party has the right of severance which he may enforce by an action of replevin to recover the share or part acquired by him. If the buyer becomes tenant in common with the seller, he assumes a risk of loss of the forty tons in proportion to his holding. If the whole forty tons were destroyed, the buyer must still pay the agreed price for the one-quarter which belonged to him, because title to that undivided fraction passed to him at the bargain, and if any amount of the forty tons were destroyed or leaked out, the buyer would have to pay the seller, the price of the one-quarter of the oil that was originally in the well and take delivery of only one-quarter of what remained.

Even though the words "at buyer's risk" are used in the contract and the seller writes "accepted" on the delivery

order, title to specific units cannot pass until there is a separation from the mass; title to only an undivided fraction would pass.

Wherever we have a contract to sell fungible goods, like oil in a cistern or well, wheat in a bin, coal in a shute, or pocket, etc., where all the particles are alike and of the same quality, title to a specific number of units of weight or measurement cannot pass at the time of the bargain, because the goods sold are not specific until they are separated from the mass; but title to an undivided fraction passes at the time of the bargain.

The leading American case on this subject is *Kimberly vs. Patchin*, 19 N. Y. 330. In that case the seller had two piles of wheat in a warehouse. He did not know exactly how many bushels there were in the two piles. The buyer proposed to purchase 6,000 bushels. Upon being shown the piles, he expressed a doubt whether they contained that quantity. The seller declared his opinion that they did and agreed to make up the quantity if they fell short of 6,000 bushels. A sale was then made and a bill of sale naming 6,000 bushels and a warehouse receipt for 6,000 bushels were given by the seller to the buyer. The wheat was left undisturbed in the warehouse. It was later discovered that there were 6,249 bushels in the two piles. It was held that title passed at the time of the bargain. There was clear indication that the parties intended title to pass at that time, since the seller signed a receipt acknowledging that he held 6,000 bushels subject to the order of the buyer and the buyer paid a portion of the price. In this case it should be noted that although the amount in the mass was undetermined and the 6,000 bushels had not been separated from the mass, the Court held that title passed to the purchaser. The line of reasoning followed by the Court was that it was possible for two or more persons to own goods confused in an indistinguishable mass of undetermined amount, and that if such ownership was possible, the parties if they so intended, could by agreement bring it about.

In *Kimberly vs. Patchin*, *supra*, the seller did not know exactly how much wheat he had in the two piles, but he thought that anyway he had at least 6,000 bushels and he sold that number to the buyer. Wheat being fungible goods,

title passed at the time of the bargain to $\frac{6,000}{\text{---}} \text{ bushels—X}$
X

being the number of bushels in the two piles, whatever that number was. If X proved to be less than 6,000, the seller would have to make it up to the buyer from other wheat of the same quality. The seller and the buyer became tenants in common, i. e. neither became owner of all the wheat in the two piles, but each the owner of an undivided share. The buyer owned a share or part of the whole, although what fraction was not exactly known. This decision has been codified in Sec. 98 and 87 of the Pers. Prop. Law of N. Y., which reads as follows:

"Sec. 98. Where there is a contract to sell unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in Sec. 87.

"Sec. 87. There may be a contract to sell or a sale of an undivided share of goods. If the parties intended to effect a present sale, the buyer, by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares.

"2. In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight or measure of the goods in the mass, and though the number, weight or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight, or measure bought bears to the number, weight or measure of the mass. If the mass contains less than the number, weight or measure bought, the buyer becomes the owner of the whole mass and the seller is bound to make good the deficiency from similar goods unless a contrary intent appears."

Of course, in contracts of this kind, the seller may warrant that the undivided fraction shall remain a definite quantity, and if he so warrants, the buyer will get ten tons no matter if thirty tons leaked out. But no such warranty is implied in contracts of this kind. It must be expressed or it does not exist at all.

Where S contracts to sell to B 10 tons of oil out of 50 tons which he then has in a certain cistern, the goods not being specific at the time of the bargain, B does not get a property right at that time to any specific 10 tons of oil, but only a contract right to 10 tons of oil. He also gets title to

an undivided fraction of the oil in the cistern, becomes tenant in common with the seller, and assumes the risk of $\frac{1}{5}$ th of the oil in the cistern, so that if any leaks out or is lost he can get delivery of only $\frac{1}{5}$ th of what is left and will have to pay the price of $\frac{1}{5}$ th of what was in the cistern at the time of the bargain. In order to avoid this chance of loss, buyers often insist that the seller shall guarantee that the buyer shall receive 10 tons when time for delivery comes, even if part of the oil had leaked out or been destroyed. But such a guarantee does not have the effect of passing title to any specific 10 tons of oil to the buyer. The oil is still as unascertained and unspecific after the guarantee was given as before. So the guarantee passes only a contract right and not a property right to 10 tons. But even if no guarantee was expressly made, the buyer would have a contract right to 10 tons by virtue of the contract itself. Does the guarantee, therefore, add nothing to what the buyer already has? Before the guarantee was made, B had, by virtue of the contract itself, a contract right not to 10 tons of oil generally, but only to 10 out of *those* 50 tons in *that* cistern. If all 50 tons leaked out or were destroyed by fire, the seller would not be bound under the contract to go out into the market and buy 10 other tons of oil like that in the cistern and deliver it to B, because S had not contracted to sell to B 10 tons of oil in general, but 10 tons out of that particular cistern. It is like the contract to sell fifty crates of grapes out of a crop of grapes to be grown in a certain definite vineyard. If the entire crop of grapes in the vineyard is destroyed, that releases the seller from any further liability.

But where S guarantees that B shall receive 10 full tons of oil on the day of delivery, the contract is no longer limited to those 50 tons in that cistern, but S must go out in the market and buy 10 tons like them and deliver them to B, if the whole or any more than 40 tons in the cistern leaked out or were destroyed. The guarantee thus has the effect of giving a contract right to 10 tons of oil generally. If 10 tons leaked out, B has a property right only to $\frac{1}{5}$ th of what remains; so on delivery he can receive only 8 tons of the oil that was in that cistern and he gets that property right as tenant in common exercising the right of severance. This right he has whether S made the guarantee or not. But if S made the guarantee, then B is entitled under that guarantee to have S make up to him the other 2 tons of the 10 tons he had contracted to purchase and S will have to

make up those other 2 tons from oil elsewhere. If there were no such guarantee, B would receive only 8 tons on delivery but have to pay the price of 10 tons.

§ 94. **Indivisible Contracts Where Part of the Goods Are Not Specific.** Where in one indivisible contract of sale, the buyer agrees to buy a quantity of specific goods in the seller's possession which the seller owns, and also to buy from the seller certain goods which are not specific, because S does not own them but will purchase them from others to fulfill his contract with the buyer, title to both lots of goods does not pass at the time of the bargain. Unless the contract expressly provides otherwise, title in none of the goods will pass until the title in all can pass. Williston on Sales, Sec. 265a; *Cooke vs. Millard*, 65 N. Y. 352; *Boiko vs. Atlantic Woolen Mills*, 195 App. Div. 207; *Pope vs. Porter*, 102 N. Y. 366.

CHAPTER IX.

TRANSFER OF TITLE—EFFECT OF DELIVERY TO
BUYER OR CARRIER OR OTHER BAILEE FOR
BUYER ON TITLE PASSING.

§ 95. **Introductory.** The commonest instance of subsequent appropriation of goods unascertained at the time of the bargain is delivery by the seller to the buyer or to a carrier or other bailee for the buyer in fulfillment of the terms of the contract of sale. So important is this as an act of appropriation on title passing and so many are the problems arising from it, that it has been thought wise to devote a separate chapter to the discussion of this subject.

§ 96. **The General Rule and Its Exceptions.** In a contract for the sale of unascertained goods, it may be stated as a general rule that if there has been no prior act appropriating goods to the contract before then, delivery of goods, of the quality and quantity ordered, by the seller to the buyer, or to a carrier or other bailee for the buyer, in accordance with the terms of the contract, will be presumed, *unless a different intention appears*, to be an unconditional appropriation of the goods to the contract with the assent of the buyer, so as to thereupon pass title in the goods to the buyer. This general rule finds expression in Subd. 2, Rule 4, Sec. 100, Pers. Prop. Law which reads as follows: "Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, etc."

And Sub'd 1 of Rule 4 provides that where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, *the property in the goods thereupon passes to the buyer.*

Here we have another act on the seller's part which may be considered as an appropriation of the goods to the con-

tract—namely, delivery of the goods to the buyer or to a carrier or other bailee for the buyer. In such cases the buyer has given his assent in advance by providing for such delivery in the contract.

It should be noted in passing that this general rule that delivery to a carrier for the buyer is an unconditional appropriation of the goods to the contract, so as to pass title to the buyer, applies even though the goods were sent c.o.d., i. e., "collect on delivery"; for Sub'd. 2 of Rule 4 goes on to state: "This presumption is applicable, although by the terms of the contract the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words 'collect on delivery' or their equivalents."

It should also be noted that the general rule stated in Subd. 2 of Rule 4 is by the express language of that subdivision subject to certain exceptions— ". . . except in the cases provided for in the next rule and in section one hundred and one." Those cases are:

(1) where the contract requires the seller to deliver the goods to the buyer, Rule 5, Sec. 100;

(2) where the contract requires the seller to deliver the goods at a particular place, Rule 5, Sec. 100;

(3) where the contract requires the seller to pay the freight or cost of transportation to the buyer, or to a particular place, Rule 5, Sec. 100.

In the three cases just mentioned, "the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon." Rule 5, Sec. 100. "In such cases the buyer has not given his assent in advance that delivery shall be an act of appropriation. The assent of the buyer is still outstanding and cannot be required of him until he has had an opportunity to inspect the goods, on demand." Jenson on Sales, Sec. 229.

(4) Where by the bill of lading, the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent. Subd. 2, Sec. 101.

(5) Where by the bill of lading the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent. Subd. 3, Sec. 101.

(6) Where the seller draws on the buyer for the price and transmits the bill of exchange and the bill of lading

together to the buyer to secure acceptance or payment of the bill of exchange. Subd. 4, Sec. 101.

In the three cases just mentioned, (4), (5), and (6), delivery of goods by the seller to a carrier for the buyer will not be presumed to be an unconditional appropriation of the goods to the contract. Whether the buyer acquires any property interest in the goods upon shipment, will be hereafter discussed. (See Secs. 123, 124, 126, 129, 130, 132, *infra*.)

It is only where the goods are unascertained and there has been no prior act of appropriation assented to by the buyer and where delivery by the seller is required by the terms of the contract, that title will not pass until delivery is made.

§ 97. **Where Contract of Sale Requires Seller Personally or Through His Own Employees and Not By a Common Carrier to Deliver the Goods at the Buyer's Residence or Place of Business, Title Does Not Pass Until and Unless the Buyer Accepts Tender of Delivery.** Of course, every contract of sale requires delivery to the buyer, unless the goods were already in the possession of the buyer at the time the contract was made, or unless the buyer intends to resell the goods, without ever himself taking delivery. In most cases, delivery to the buyer is contemplated and required, but if no place of delivery is specified, either by the contract or usage, the buyer must come and take delivery at the seller's place of business. Generally, his act of calling or sending for the goods will be an assent to the seller's act of appropriating the goods to the contract by setting them aside for him and notifying him that they are ready. In such cases, therefore, title may and often does pass before the buyer actually takes the goods into his possession. But frequently the contract expresses the place at which the seller is to deliver the goods. If the place so named is other than the seller's place of business and the seller is to deliver the goods at that place through a common carrier, whose charges are to be paid by the buyer, title, as we shall see in Section 104, *infra*, passes as soon as the goods are delivered to the carrier. But if the seller is to deliver the goods at the place named, by himself or through his own paid agents or employees, title does not pass until and unless the buyer accepts tender of delivery.

The Sales Act defines "delivery" as the "voluntary transfer of possession from one person to another." Sec. 156, Pers. Prop. Law. But "a transfer of possession does not

mean an offer to transfer and a refusal to accept." *Stanley vs. Dryer*, 70 Misc. 561, 563. "The seller may not force the goods upon a buyer unwilling to receive them. The buyer, when delivery is tendered, may refuse to assent to it at all (taking, of course, the risk of liability for damages), or may assent subject to the condition that he be allowed to see the goods before delivery or appropriation shall be deemed complete." *Glass & Co. vs. Misroch*, 239 N. Y. 475, 482. Therefore, where the contract requires the seller to deliver the goods to the buyer at the latter's place of business, there is no delivery and no passing of title, if the buyer refuses to accept delivery.

§ 98. **Where Contract of Sale Requires Seller Personally and Not Through a Carrier to Deliver the Goods at the Buyer's Residence or Place of Business, Buyer Has Right to Inspect the Goods Before Accepting Tender of Delivery and Title.** Where the contract of sale requires the seller personally and not through a carrier to deliver the goods at the buyer's residence, or place of business, the buyer has the right to inspect the goods, in order to determine whether delivery shall be permitted and whether the title shall pass. *Beals vs. Hirsch*, 214 App. Div. 86. "The buyer is entitled to examine the goods to decide whether he will become the owner, and until the examination is completed or waived, he is under no obligation to accept the goods." *Williston on Sales*, Sec. 472. But if the buyer accepts tender of delivery without first inspecting the goods, title passes, but he still has the right to examine the goods within a reasonable time after delivery to see if they conform to the contract, and if he finds that they do not, he may upon prompt notice revest title in the seller. "There is a difference between inspection following delivery, and inspection to determine whether delivery shall be permitted." *Glass & Co. vs. Misroch*, 239, N. Y. 475.

§ 99. **Where Contract of Sale Requires Seller Personally and Not Through a Carrier to Deliver the Goods at the Buyer's Residence or Place of Business, Buyer May Refuse to Accept Delivery For Any or No Reason, and Thus Prevent Title Passing.** Where the contract requires the seller to deliver the goods to the buyer, the buyer has not given his assent to the tender of delivery as an unconditional appropriation of the contract, until he has completed or waived the preliminary inspection of the goods. In a case of this kind, the buyer has the outstanding right to inspect, in order

to determine whether or not he wants to assent to the appropriation; and it is in such a case that "you can no longer force a title on an unwilling purchaser." *Jensen on Sales*, Sec. 232. Where in such a case the buyer refuses to accept delivery, the seller cannot maintain an action for the price, for title has not passed until the buyer accepts the delivery; the seller's remedy is to sue for damages for failure of the buyer to accept delivery or to resell and bring action for the loss sustained. *Reichbart vs. Smith-Eiseman Corp.*, 199 App. Div. 571.

§ 100. **Where Contract Requires Delivery at Buyer's Place of Business, Merely Setting Goods Aside in a Deliverable State at Seller's Place Will Not Pass Title.** Where the contract requires delivery at the buyer's place of business, the plaintiff cannot recover the price in an action for goods sold and delivered, where the evidence shows that the goods were not delivered at the buyer's place of business but merely appropriated to the contract by being set aside in a deliverable state at the seller's own place of business; for, where the contract requires delivery at the buyer's place of business, the buyer generally assents to no act of appropriation other than the delivery at his place of business. *Bready vs. Wechsler*, 200 App. Div. 78, *aff'd* 235, N. Y. 539. However, in such a case, if by a subsequent agreement it is stipulated that the seller should set aside the goods and hold them for the buyer, the seller might recover under Subd. 1, Rule 4, on the ground that there had been an appropriation with the assent of the buyer so as to pass title.

§ 101. **Where Contract Requires Delivery at Buyer's Place of Business Generally Actual and Not Constructive Delivery Is Required.** Where the contract requires delivery to the buyer at his place of business, title will not pass, unless there is actual delivery and acceptance by the buyer, or by his authorized agent. But where goods are bulky, a constructive delivery may be made at the place where the goods are stored. *Pollen vs. Le Roy*, 30 N. Y. 549; *Dunham vs. Pettee*, 8 N. Y. 508; *Salmon vs. Brandmeier*, 104 App. Div. 66; *Hubbard vs. Rockaway Lunch Co., Inc.*, 131 Misc. 53; Subd. 3, Sec. 124, *Pers. Prop. Law*. See following section (Sec. 102, *infra*).

§ 102. **Delivery of Goods in the Possession of a Third Person.** Where at the time the contract of sale is entered into, the goods are in the possession of a third person as

bailee for the seller, and the contract of sale requires the seller to deliver the goods to the buyer, there is no delivery and no passing of title until the third person has been notified of the sale *and* acknowledges to the buyer that he holds the goods for him; but as against all others than the seller, the buyer shall be regarded as having received delivery and title from the time when such third person first has notice of the sale. Subd. 3, Sec. 124, Pers. Prop. Law.

This section does not refer to goods which are to be manufactured by a third person for the seller, and are in the possession of the third person for that reason. *Kent vs. Silberstein*, 200 App. Div. 52.

In *Robinson vs. All Lite Sales Co.*, 202 N. Y. S. 260, the plaintiff tendered to the buyer an order on the warehouse, but the warehouseman did not notify the buyer that it held the goods subject to its order. The title, therefore, never passed and an action for the price was not maintainable.

The mere mailing by the seller of a transfer order to the buyer and warehouseman does not constitute a delivery so as to enable the seller to sue for the purchase price. *Borenco Co. vs. Sperber*, 205 App. Div. 417. Compare *Little vs. Lamb*, 108 Misc. 14.

In *Turner-Looker Co. vs. Aprile*, 195 App. Div. 706, 709, aff'd 234 N. Y. 21, in speaking of a tender of warehouse receipts in performance of a contract to sell whiskey, the Court said: "The tender of the bonded warehouse receipts constituted a valid tender of delivery of the ten barrels of whiskey in question, and the tender of performance, by the tender of delivery of the warehouse receipts, was equivalent to an actual delivery of a tender of physical delivery of the whiskey in question." It was, therefore, held that the plaintiff was justified in bringing his action in the form of an action for goods sold and delivered. *Jensen on Sales* says in reference to this case, Sec. 186: "By making out the certificates identifying the barrels, the seller appropriated the barrels to the contract. The buyer's assent to this appropriation was given by the order. The title, therefore, had passed before the tender of the documents was made. (Rule 4, Subd. 1)."

In *Hubbard vs. Rockaway Lunch Co. Inc.*, 131 Misc. 53, 58, the Court said, in reference to a case where no place of delivery had been specified in the contract or by usage of trade, and the goods unknown to the buyer were at a place other than the seller's place of business, that the seller might make a constructive delivery of the goods at the warehouse

where they were stored but that he "could not avoid delivery at his place of business and claim a constructive delivery at the storage company's warehouse, until he had identified and appropriated the goods to the contract and thereupon served notice on defendant (the buyer) that the goods had been so appropriated at the warehouse and until the warehouse company had given notice to defendant that it would release the goods so appropriated to defendant on plaintiff's (seller's) order and until plaintiff had executed and delivered to defendant such an order. To constitute such a delivery, the goods must, at least, be placed in the power of the vendee (*Gross vs. Ajello*, 132 App. Div. 25)."

§ 103. **Effect of an Obligation of the Seller to Deliver at a Particular Place Other Than Buyer's Place of Business or Residence.** Where by the terms of the contract the goods are to be laid down at a particular place, mere delivery at the agreed place transfers the property to the buyer. *Williston on Sales*, Sec. 280. In *Austin Nichols & Co. vs. Heermance Storage Co.*, 199 App. Div. 626, while the goods were en route to the seller from California, the seller sold them, to be delivered to the buyer at the Brooklyn Terminal. When the goods arrived in New York City but before they were delivered at Brooklyn Terminal, but were at St. John's Station, the seller secretly removed them and refused to furnish a bill of lading or delivery order to the buyer, although he offered to pay for them. In the buyer's action in replevin, it was held that he could not recover as the title had not passed, since the goods had not been delivered at the particular place. The proper action would have been for damages for failure to deliver.

Where the contract calls for delivery by the seller at a certain place, no title passes unless and until delivery is made at that place. *Smiley Steel Co. vs. Schmoll*, 200 App. Div. 655, *aff'd* 235 N. Y. 520; *Schultz vs. De Nood*, 194 App. Div. 149; *Westmore Land Co. vs. Syracuse Co.*, 159 App. Div. 323.

The following concise statement of the law in regard to passage of title where the contract provides for goods deliverable at a particular place is taken from an editorial appearing in the *New York Law Journal* of December 10, 1928:

"It is clear that where the contract specifically requires that the seller shall deliver the goods to a place specified, the plaintiff is not entitled to recover their purchase price unless it shows either that the goods reached that place or were

delivered to the buyer. In such cases Rule 4, section 100, providing that title passes when and where property is appropriated to the contract, has no application, for the reason that the intention is made manifest that no title shall pass unless the goods are delivered at the particular place denominated. Therefore, although ordinarily upon a sale f.o.b. or c.i.f., as the case may be, title would pass upon the delivery of the goods to the carrier (*Rosenberg Bros. & Co. vs. Buffum Co.*, *supra*; *Seaver vs. Lindsay Light Co.*, *supra*; *Standard Casing Co. vs. California Casing Co.*, *supra*), this rule would have no application where the terms of the agreement manifest that the intent of the parties is that title shall not pass until a specified point of delivery has been attained. The passage of title, indeed, always depends upon the intention of the parties (*Procter & Gamble Co. vs. Peters*, 233 N. Y., 97)."

In *Sidford & Greene vs. Wehmeyer Coal Co.*, 230 N. Y. S. 611, *aff'd* without opinion in 221 App. Div. 778, *aff'd* without opinion 248 N. Y. 539, the contract required the seller to deliver coal "alongside limits," which meant the towing limits of the railroad company. Before it reached that place, the buyer cancelled the order. In an action to recover the purchase price, it was held the seller could not recover, as there had been no delivery as required by the contract and until then title did not pass even though the coal had been appropriated to the contract by shipping it by rail, as the buyer had not assented to that as an appropriation, where he required delivery at a particular place. The case was governed by Rule 5, and not by Subd. 2, Rule 4.

§ 104. **Effect of Delivery to Carrier for Buyer.** Where the contract requires the seller to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, is deemed to be a **delivery to the buyer**, except in the cases provided for in Rule 5, i.e., where the contract requires the seller to pay the freight or to deliver the goods at a particular named place. Sec. 127, Pers. Prop. Law. And under Subd. 2, Rule 4, Sec. 100, delivery by the seller of the goods to a carrier for the buyer, if in accordance with the terms of the contract, is presumed to be an unconditional appropriation of the goods to the contract, except in the cases provided for in Rule 5 and in Sec. 101.

Where the seller, pursuant to the contract, puts the goods, ordered by the buyer and in a deliverable state, into

freight cars (if it is in one or more carload lots), it is an unconditional appropriation to the contract with the assent of the buyer and the title passes. *Acme Co. vs. Braddock*, 203 N. Y. S. 554. In *Perkins vs. Minford*, 235 N. Y. 301, it was held that title passed when the goods were delivered to the buyer's ship.

In *Henry Glass Co. vs. Misroch*, 239 N. Y. 475, the Court of Appeals said by way of *obiter dictum*: "The cases are many in which goods are shipped by carriers who receive them for the buyers. An order for such shipment is an assent that the goods be appropriated by the seller, and title passes when they are delivered to a carrier in a deliverable state."

In *Schanz vs. Bramwell*, 143 N. Y. S. 1057, the seller was directed by the buyer to make a suit of clothes for him and to ship the same to him at Long Branch. The carrier was not named; the goods were shipped and lost. The loss fell on the purchaser, title having passed when the goods were placed in the hands of the carrier.

After the goods have been delivered to the carrier, in pursuance of a contract of sale, the title passes and the seller is not responsible for the carrier's delay in making delivery to the purchaser. *Glass Co. vs. Banca*, 122 Misc. 637; see also *Woodland Co. vs. Barnett*, 185 App. Div. 572.

Where the contract of sale requires the seller to deliver the goods to a carrier for transmission to the buyer, the buyer has assented in advance to such act on the part of the seller as an appropriation of the goods to the contract and he has no right to inspect or examine the goods on arrival to determine whether title shall pass. "Where the buyer enters into that kind of a contract, the law raises the presumption that the goods, in so far as the passing of the title is concerned, are in accordance with the contract.—The delivery here referred to, is entirely different from that mentioned in Rule 5. There the delivery is a tender of delivery with a right to inspect before acceptance of the tender." *Jensen on Sales*, Sec. 196.

§ 105. **What Constitutes Delivery to a Carrier.** The "delivery to the carrier" referred to in Subd. 2, Rule 4, is a delivery by which the carrier obtains the actual possession and control of the goods. In a recent California case the seller had contracted to sell 1,000 sacks of oats to the buyer and the contract called for the seller to deliver them to a certain named railroad for the buyer. The oats were to be

shipped in carload lots. The seller ordered freight cars from the railroad and on their delivery proceeded to load the cars with the bags of oats. When the cars were not completely loaded, they were burned together with the oats in them. It was held that there had not been a delivery to the carrier until the cars were completely loaded and the loss must fall on the seller. *Lewis vs. Farmer's Grain & Milling Co.*, 198 Pac. 426.

Proof that the seller delivered the goods to the truckman of the freight agent and that the bill of lading was signed by him, seems not to be sufficient proof of delivery to the carrier. *Stern vs. Wohl*, 212 App. Div. 154.

§ 106. Effect of Contract Requiring Seller to Pay the Freight. Subd. 2 of Rule 4 gives us the general rule that where the contract requires the seller to deliver the goods to the buyer or to a carrier for transmission to the buyer, such delivery is presumed to be an unconditional appropriation of the goods to the contract and passes title to the buyer, except in the cases provided for in Rule 5 and in Sec. 101.

The only part of Rule 5 which refers to delivery by a common carrier are the words "if the contract to sell requires the seller . . . to pay the freight or cost of transportation to the buyer or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon." Thus it is seen that Rule 5 does not cover the case where the contract to sell requires the buyer to pay the freight or cost of transportation and in such cases, therefore, title passes as under Subd. 2 of Rule 4, i.e., on delivery of the goods to the carrier "unless a different intention appears."

§ 107. F.O.B. Contracts. Where the buyer is to pay the freight, the contract is often spoken of as a sale f.o.b. point of shipment. The letters f.o.b. originally stood for the words "free on board," as they were first used in reference to transportation by sea and meant that the seller was bound to put the goods free of expense on board a vessel for transportation to the buyer, i.e., that the price named as the selling price includes all charges for packing, freight, lighterage, storage, and dock charges, up to and including placing the goods on board the proper vessel, so that the buyer would not have to pay *anybody else* anything in getting the goods on board.

"The meaning of those letters where railroad transportation is concerned is the same except that the goods are put 'free on board' cars instead of 'free on board' vessels." Williston on Sales, Sec. 280a.

"If the buyer is to pay the freight, it is a reasonable supposition that he does so because the goods became his at the point of shipment and the carrier is his agent in transporting them. On the other hand, if the seller is to pay the freight, the inference is equally strong that the duty of the seller is to have the goods transported to their ultimate destination and that the carrier is his agent in transporting the goods. Accordingly, if the seller is to pay freight, the presumption is, as stated in rule 5, that the property does not pass until the goods have reached their destination." Williston on Sales, Sec. 280.

The general rule is that upon a sale "f.o.b. the point of shipment," title passes to the buyer at the moment of delivery to the carrier, and the subject of the sale is thereafter at the buyer's risk. This rule, however, as stated by Judge Cardozo, is subordinate to the intention of the parties. But a contrary intention is not shown by a clause in the contract providing for payment by sight draft at point of arrival, with right in the purchaser to examine the goods, *Standard Casing Co. vs. California Casing Co.*, 233 N. Y. 413; nor by a clause in contract permitting the seller to take the bill of lading to his own order, *Rosenberg & Co. vs. Buffum Co.*, 234 N. Y. 338.

§ 108. **What Constitutes Paying Freight by the Buyer?**
Does not the buyer always pay the freight in the long run? In *Columbia Mills vs. Mackenback Importing Co.*, 117 Misc. 283, the seller manufactured goods for the buyer and shipped them under a straight bill of lading from New York to the buyer's place of business in Yonkers. They were lost in transit. The course of dealing between the parties was that the seller would not prepay the freight, but the buyer would pay the freight on arrival of the goods and the seller would deduct the freight from the amount of the bill for the goods. The buyer contended that because of this custom, the seller was really paying the freight and hence title in the goods sent to him would not pass until the goods reached their destination; and as they never reached their destination the loss should fall on the seller. But the Court held otherwise. The Court decided that the buyer was paying the freight and hence title passed to the buyer on shipment and he would

have to stand the loss. The Court said: "Where, however, the seller is, under the contract, called upon only to deliver the goods to the carrier, and the buyer is required before he can receive delivery, to pay the carrier's charge, the mere fact that such charges are included in the purchase price, and that the buyer is entitled to set them off against payment of the contract price, cannot prevent the property passing to the buyer, when the goods are delivered to the carrier."

Thus it appears that where the freight is to be paid in the first instance by the buyer, the carrier is the buyer's agent and title passes to him on shipment, even if in a final adjustment of accounts the seller is to ultimately bear the expense of the freight.

Now suppose that instead of the contract requiring the buyer to pay the freight in the first instance and instead of the seller allowing him a deduction therefor on the price, the contract requires the seller to pay the freight in the first instance and the freight item is included in the bill for the goods, will the passing of title be deferred until the goods reach their destination? That is the situation in what is known as a c.i.f. contract.

§ 109. C.I.F. Contracts. The letters c.i.f. stand for the words "cost, insurance, and freight" and mean that the price quoted and agreed upon covers not only the cost of the goods at the point of shipment, but also their insurance and freight to the point of destination. Under a c.i.f. contract the seller undertakes to ship the goods, pay the freight, and take out and pay for insurance on the goods in transit, in return for a lump selling price which includes (1) invoice cost of the goods at point of shipment, (2) freight, and (3) insurance premiums. The buyer is bound to pay the lump sum including those three items on receipt by him of the shipping documents without awaiting the arrival of the goods. As the insurance is for the protection of the buyer, he assumes all risks after the goods have been placed on board, and this constitutes a delivery by the seller, and title thereupon passes to the buyer, even though it be stated in the contract that delivery was to be made at the point of destination. *Smith Co. Ltd. vs. Moschalades*, 193 App. Div. 126; *Seaver vs. Lindsay Light Co.*, 233 N. Y. 273, 276. The c.i.f. contract above described is known as a straight c.i.f. contract.

But if the language of the contract shows the intention that the buyer is not to pay for the goods on receipt of ship-

ping documents but on the arrival of the goods, then it is not a straight c.i.f. contract but a modified c.i.f. contract and title will not pass until the goods reach their destination. So if the contract provides: "Terms of payment net cash against shipping documents in New York on arrival of the goods," that shows the parties did not intend the buyer to pay on receipt of shipping documents, and it is therefore a modified c.i.f. contract and title will not pass until the goods arrive. *Johnson & Higgins vs. Garriques & Co.*, (U. S. Dist. Co. So. Dist. N. Y.) 22 Fed. (2d Series) 454. But see *Penick & Co. vs. Helvetia Commercial Co. Inc.*, 212 App. Div. 519, where the contract called for a shipment of goods from Trieste "c.i.f. New York" and provided for "net cash against delivery order." The Appellate Division for the First Department held that that clause had reference solely to the terms of payment, that the terms of payment do not change the form of the contract, that Trieste, the point of shipment, was the place of delivery, and damages should be computed as of that place instead of on the market price in New York. It would seem that the c.i.f. contract was modified by the clause that the delivery of the goods was to be made only upon receipt of cash in New York City, as in a straight c.i.f. contract the buyer is under the duty to pay the price before the arrival at the point of destination; i.e., he is under the duty to pay the price on receipt of the shipping documents. But the Court construed the clause in question to be one for the purpose of security for the seller and meant that he could withhold delivery order until the goods were paid for in cash, quoting the following from *Williston on Sales*, Sec. 599f: "It seems impossible to distinguish the case from that usual in f.o.b. contracts, for in such contracts as well as in c.i.f. contracts, the seller often retains a lien or security title by means of the bill of lading. The American authorities, therefore, deal with the matter as a contract for the sale of goods, holding that though the seller still may retain a security title, he has completed his duty with reference to the goods when he has shipped them and that the market value at the place of shipment accordingly furnishes the test."

"The theory of a c.i.f. contract is that it constitutes a sale of goods by delivery, not of goods, but of documents, viz., a bill of lading, invoice and policy or certificate of insurance." *Dwane vs. Weil*, 199 App. Div. 719, 730.

In *Willits & Patterson vs. Abekobel & Co., Ltd.*, 197 App. Div. 528, the Court pointed out that, though usually

under c.i.f. contracts the risk of transportation rests upon the buyer, "if, however, there be anything in the contract which shows that such was not the intention of the parties, the contract will be construed according to their intention." In that case the contract provided for "net landed weight, price \$15.00 per 100 lbs. c.i.f. San Francisco," and the Court held that these terms showed an intent that "The weight at the point of landing, to wit, San Francisco, must accord with the requirements of the contract," and that the ordinary meaning of the expression "c.i.f." must be deemed modified, so as to make the contract one for delivery at San Francisco.

But in *Warner, Barnes & Co. vs. Warner Sugar Ref. Co.*, 192 N. Y. S. 151, the contract contained, in perhaps even stronger terms, the same indicia of intention to place the risk upon the seller than in the contract in the *Willits* case, *supra*. It expressly provided for the payment of the price according to "landed weights," and it further expressly provided for delivery of the goods in New York ex vessel at wharf. Yet the Court held that in view of the fact that the seller had the right, upon presentation of full shipping documents, including full insurance, to draw upon the buyers for 90 per cent of the invoice price, the delivery of the documents to the buyers was strong evidence of an intent to give the buyers dominion over the goods covered by the documents, and to place the risk of loss upon the buyers. In the *Willits* case the seller retained the policy of insurance, whereas in the *Warner* case the insurance was delivered to the buyers and protected the buyers against loss. The Court, therefore, construed the contract to mean that, though the seller was required to deliver the goods at a customary wharf in New York, and the price could not be finally determined until the goods were landed, yet that the property in the goods and the risk of loss were intended to pass when the full shipping documents were presented, including an insurance policy. The Court said: "If the goods were totally lost, then by the express terms of the contract, the buyers were to pay the full amount of the invoice and if the goods were partially lost, then it is fairly inferable that, while payment was to be made according to landed weights, the seller should not be deprived of the right to show that these landed weights were diminished by loss or damage due to the risk of the voyage. Any other construction of the contract would require the seller to provide insurance for the buyer for a loss which falls not on the buyer, but on the seller."

Where the contract provides that the price stated was "c.i.f. New York," and the goods are insured in the seller's name and the bill of lading taken to the seller's order, it is a modified c.i.f. contract and the place of delivery is in New York and not at the point of shipment. *Schopflocher vs. Essgee Co. of China Inc.*, 197 App. Div. 781.

As Rule 5 of Sec. 100 provides that if the contract requires the seller to pay the freight or cost of transportation to the buyer or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon, it has been argued that where this statute is in force the effect of a c.i.f. contract has been changed, and that no property interest passes to the buyer on shipment of the goods. It has, however, very properly been observed that the rule of the Sales Act is made applicable only "unless a different intention appears" and in a c.i.f. contract a different intention does appear. *Smith vs. Moschlades*, 193 App. Div. 500; *Warner vs. Warner Sugar Ref. Co.*, 117 Misc. 247; *Williston on Sales*, Sec. 280e.

§ 110. **C.O.D. Shipments.** The meaning of the letters c.o.d. is "collect on delivery." The object of the seller in so marking the goods is to instruct the carrier not to deliver them to the buyer until the price has been collected. When does title pass in a c.o.d. shipment? When the seller delivers the goods to the carrier, or not until the carrier delivers them to, and is paid by the consignee? Prior to the adoption of the Sales Act in New York, there were two decisions holding that in c.o.d. shipments title did not pass until delivery to the buyer. *Baker vs. Bouricault*, 1 Daly 23; *Conway vs. Bush*, 4 Barb. 564.

In *Higgins vs. Murray*, 73 N. Y. 252, also decided before the Sales Act was adopted in New York, the defendant employed the plaintiff to make him a set of circus tents. The plaintiff made them and the defendant requested them to be sent. The plaintiff shipped them c.o.d. and they were destroyed by fire en route. They had not been paid for, and the plaintiff, the seller, brought an action against the buyer to recover the contract price. It was held that the buyer would have to pay the contract price. That could only be so if title had passed upon shipment, in spite of the words c.o.d. Some doubt has been thrown on this case as an authority to that effect, by the fact that the Court considered the contract not one for the sale of goods but for work and labor, for which the buyer should pay, even though

the tents were lost during shipment. But the plaintiff did not sue to recover the reasonable value of the work, labor and materials. He sued for the contract price as for an outright sale, and he was allowed to recover just what he would have recovered if there had been a sale and title had passed on shipment, even though the shipment was c.o.d.

However, all doubt on this subject seems to have been removed by Subd. 2, Rule 4, Sec. 100, Pers. Prop. Law, which provides: "Where, in pursuance of a contract to sell, the seller delivers the goods to a carrier for the purpose of transmission to the buyer, he is presumed to have unconditionally appropriated the goods to the contract. This presumption is applicable although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words 'collect on delivery' or their equivalents."

In other words, Subd. 1 of Rule 4 provides that appropriation by the seller with the assent of the buyer passes title to unascertained goods, and Subd. 2 provides that delivery by the seller to the carrier will be such an appropriation as to pass title even though the goods are marked c.o.d. Title may pass on delivery to the carrier in spite of the letters c.o.d., if it would have passed otherwise. But the use of the letters c.o.d. will not make title pass on delivery to the carrier if it would not have passed otherwise. In short, the letters c.o.d. have not any effect one way or the other on title passing but merely reserve to the seller a lien on the goods for the price, even though title has passed.

A shipment of goods c.o.d. contemplates that the carrier will collect the amount specified in cash. If he accepts a check in lieu thereof, he does so at his own peril, and is liable to the seller for the price of the goods. *Mogul Inc. vs. Lewis Inc.*, 220 App. Div. 287.

§ 111. Delivery to Carrier of Goods Not As Ordered—Effect on Title Passing on Shipment. Where the contract requires the seller to deliver goods to a carrier or other bailee for the buyer, the seller is authorized by the buyer to appropriate only such goods as conform to the contract or order. *Williston on Sales*, Sec. 278. *Cardozo, J., in Glass & Co. vs. Misroch*, 239 N. Y. 475, 480, said: "His assent to the appropriation of goods in a deliverable state is not assent to the appropriation of any goods, though of a kind or a quality at variance with the contract." If, therefore, the

goods which the seller sends are not of the kind or quality ordered, the property will not pass. *Pope vs. Allis*, 115 U. S. 363.

Where the seller is to deliver the goods to the buyer personally, if he takes them without examining them, he assents to the appropriation and title passes to him, even if they were not the goods he ordered, but a right survives to examine them and revest title in the seller by rescinding the contract within a reasonable time thereafter. *Glass & Co. vs. Misroch*, 239 N. Y. 475, 484. There is no hardship on the buyer in holding that title passed to him upon delivery, even if the goods were not as ordered, because he had an opportunity of inspecting them before he accepted delivery and he waived that opportunity. But where delivery is made to a carrier, the buyer ordinarily has no chance of inspection prior thereto, and hence there is no assent to the appropriation by the receipt of the goods by the carrier, without such inspection, where the goods are in fact different from those the contract or order called for.

For the same reasons the property will not pass if the goods shipped are too many or too few. *Coninger vs. Crocker*, 62 N. Y. 151; *Lamborn vs. Seggerman Bros.*, 240 N. Y. 118.

The rights and remedies of the buyer, where the seller ships or delivers defective goods, or those not in conformity with the contract, or the wrong quantity, are dealt with in a subsequent chapter (Chap. 17, *infra*).

Likewise, the act of the seller in delivering the goods to a carrier for the buyer will not be deemed an appropriation of the goods to the contract with the assent of the buyer so as to thereupon pass title, if the goods (1) are sent at a materially different time than the contract called for; or (2) are sent by a different route, *Reynolds vs. Spencer*, 92 Hun. 275; or (3) are sent by a different method of shipment, *Hills vs. Lynch*, 3 Rob. (N. Y. Super. Ct.) 42; or (4) are sent under a different bill of lading; or (5) are misdirected; or (6) are not packed in a reasonably careful manner, having in view the nature of the goods and the transit, *Williston on Sales*, Sec. 278; or (7) are shipped under a contract with the carrier which does not reasonably protect the buyer's rights.

"If goods are shipped, but because of some failure on the part of the seller to comply with the terms of the offer

or contract, or with the duties imposed upon him by law, the property does not pass, the shipment constitutes an offer by the seller to the buyer; for there is a clear manifestation by the seller of willingness to allow the buyer to have the goods shipped, in satisfaction of the seller's obligation under the contract, or in performance of the order or offer previously sent by the buyer; and this cross-offer of the seller will be accepted by the buyer if he accepts the goods after an opportunity for inspecting them, or after he is,—or ought to be, aware of the seller's failure to comply with the terms of the original contract or offer." Williston on Sales, Sec. 278.

§ 112. **An Appropriation of Too Large a Quantity Is Not the Appropriation Required by the Contract, and no Title Passes.** In *Lamborn vs. Seggerman Brothers*, 240 N. Y. 118, the contract called for the defendant to sell and deliver to the plaintiffs 1,200 fifty pound boxes of apples, f.o.b. point of shipment, "payment to be made against draft with documents attached." 1,770 fifty pound boxes were shipped, under a shipper's order bill of lading and the defendant delivered to the plaintiffs an invoice for 1,200 boxes, accompanied by a delivery order for 1,200 boxes. Upon receipt of these documents the plaintiffs paid to the defendant the price. The apples were seized by the United States Government officials before they arrived, and the plaintiffs never received the 1,200 boxes of apples for which they had paid. It was held that the plaintiffs could recover the price so paid, as title to the apples had not passed to them. The Court said that the plaintiffs undoubtedly consented in advance to the appropriation of the 1,200 boxes of apples, but until such appropriation was made the risk of loss did not pass to the plaintiffs. The Court said, "There was a consent in advance to appropriation of goods to the contract by delivery of goods to the carrier for transmission to the buyer in accordance with the terms of the contract and appropriation made in accordance with such consent would pass title and attendant risk of loss, but in the present case there has been no such appropriation by the defendant of any ascertained goods to the plaintiff's contract. The delivery to the carrier, which would transfer responsibility to the buyer, was only such delivery as the seller was authorized to make . . . A delivery by a seller to a carrier, even for the purpose of transmission to the buyer of a quantity greater than the amount called for by the contract does not constitute an ap-

appropriation of goods to the buyer's contract which constitutes a delivery to the buyer sufficient to pass property in any of the goods."

§ 113. In Resisting Action for the Price, or in Action to Recover Price Paid, Buyer Has Burden of Proving That Goods delivered to Carrier Were Not in Accordance With Contract. In *Glanzer vs. Armsby Co.*, 100 Misc. 476, there was a contract to sell beans f.o.b. point of shipment. Seller shipped them under a seller's order bill of lading in compliance with this contract, notifying the buyer. The contract also provided for "net cash on arrival and examination at destination." The bill of lading indorsed in blank was attached to a draft and presented to the buyer and paid. The beans covered by the bill of lading never arrived in New York but were seized and destroyed by Federal Inspectors owing to the fact that they were "buggy." The buyers sue to recover the amount of the draft they paid, claiming that since the draft was given in payment for beans and they have never received any beans, there has been an entire failure of consideration and they are entitled to recover the amount paid on the draft. The buyers, the plaintiffs, made no attempt to prove that the beans delivered to the carrier were not in accordance with the contract of sale, or even that they were destroyed by reason of conditions which existed at the time of shipment. The Court said: "Since in this case, the plaintiffs must show failure of consideration for the payment made to the defendant, they have the burden of proving that the goods delivered to the carrier were not in accordance with the contract of sale."

The Supreme Court of the United States has held that where hay was delivered to a railroad company with the privilege of the buyer to inspect it on arrival, title passed on delivery of the carrier subject to the right of rescission, if defects were afterwards discovered. *D. L. & W. R. R. Co. vs. U. S.*, 231 U. S. 363.

It is, therefore, the view of both the Federal and New York Courts (*Standard Casing Co. vs. California Casing Co.*, 233 N. Y. 413; *Glass & Co. vs. Misroch*, 239 N. Y. 475; *Glanzer vs. Armsby Co.*, 100 Misc. 476; *D. L. & W. R. R. Co. vs. U. S.*, supra) that title, as far as risk of loss and liability to pay the price if goods not lost are concerned, passes on shipment to the buyer, even though the buyer reserves the right to inspect the goods upon arrival; and he will have to pay the price if the goods shipped are lost or

destroyed before he has had a chance to inspect them, unless he proves by a preponderance of evidence that the goods shipped were not as ordered or were defective. Such a situation arose in an Oregon case, where the buyer reserved by the contract the right to inspect the goods upon arrival to see whether they corresponded with the sample. The goods were destroyed before the inspection took place. It was held that the loss must fall on the buyer, because title passed to him on shipment. *Wadhams vs. Balfour*, 32 Ore. 313.

CHAPTER X.

TRANSFER OF TITLE AS EFFECTED BY THE FORM OF THE BILL OF LADING.

§ 114. **Introductory.** The general rule is that delivery of the goods to a carrier for the buyer in accordance with the terms of the contract of sale is presumed to be an unconditional appropriation of the goods to the contract so as to pass title as of that time, if it had not passed before then. Subd. 2, Rule 4. But to that rule there is the exception stated in Rule 5; namely, where the seller is to pay the freight or cost of transportation to the buyer or to a particular place. This exception was discussed in Chapter IX. We shall now discuss the other exception to the general rule set forth in Subd. 2, Rule 4; namely, the exceptions contained in Sec. 101, Pers. Prop. Law (see Sec. 96, *supra*).

§ 115. **Function of Bill of Lading.** In two respects bills of lading may play an important part in the passing of title; first, as between the seller and the buyer the form of the bill of lading may indicate whether delivery to the carrier was intended as a final or only a conditional appropriation of the goods to the contract, and second, as between the seller or his agent and some third person, or as between the buyer or his agent and some third person, a transfer of the bill of lading may operate to pass the title in the goods to such third person. We shall take up the first of these roles in the present chapter, and reserve discussion of the second until Chapter XII.

§ 116. **Forms of Bills of Lading.** Where the contract of sale requires the seller to ship the goods to the buyer, the seller may have the carrier make out the bill of lading in any of the following forms:

(1) a straight bill of lading naming the buyer as consignee.

(2) a straight bill of lading naming himself as consignee, as well as consignor.

(3) a straight bill of lading naming his agent or some third person as consignee.

(4) an order bill of lading in which the carrier agrees to deliver the goods to the order of the buyer.

(5) an order bill of lading in which the carrier agrees to deliver the goods to the order of the seller.

(6) an order bill of lading in which the carrier agrees to deliver the goods to the order of some third person.

We shall now proceed to discuss the effect of taking the bill of lading in each of these forms.

§ 117. Effect of Straight Bill of Lading Naming the Buyer as Consignee. If the seller takes a straight bill of lading naming the buyer as consignee, title passes upon shipment to the buyer, for it will be presumed that he intended delivery of the goods to the carrier to be a final and unconditional appropriation of the goods to the contract. Sec. 101, Subd. 2; see also Sec. 226, Pers. Prop. Law. In *Penn. R. R. Co. vs. Bank of United States*, 214 App. Div. 410, goods were sold f. o. b. point of shipment, to be shipped on an "order-notify" bill of lading, but by mistake of the carrier were shipped under a straight bill of lading. It was held that title passed to the consignee upon shipment, although the parties did not intend title to pass unless and until the goods were paid for.

§ 118. Effect of Straight Bill of Lading Naming Seller as Consignee. "If the seller takes out a bill of lading in which he is named as consignee, as well as consignor, the carrier is a bailee for the seller, not for the buyer, and the title is retained, and this is so even though the goods are shipped on the buyer's vessel, for the captain having authority to sign bills of lading, by so doing, constitutes himself as an independent bailee of the goods for the shipper." *Wiliston on Sales*, Sec. 283.

§ 119. Effect of Straight Bill of Lading Naming Some Third Person as Consignee. If the third person named as consignee is the seller's agent, title does not pass to such third person, because it was never intended to pass to him, and title will not pass unless the parties so intended. Sec. 99, Pers. Prop. Law. In such a case title remains in the seller.

Generally the purpose of the seller in naming some third person as consignee is that the third person shall retain the bill of lading and the goods, until the buyer pays the price. This protects the seller, for the carrier will not deliver the goods except to the person named as consignee in a straight

bill of lading, or to some one authorized by him to receive the goods. Title to the goods does not vest in such person by naming him as consignee, because that was not the intention of the parties. Title in such case remains in the seller.

§ 120. Effect of Order Bill of Lading to Order of Buyer. The effect of taking an order bill of lading in which the carrier agrees to deliver the goods to the order of the buyer is to pass title to the buyer on shipment, if it has not passed before. It shows an intention that delivery of the goods to the carrier is a final and unconditional appropriation of the goods to the contract. Sec. 226, Pers. Prop. Law.

§ 121. Effect of Order Bill of Lading to Order of a Third Person. Where the seller takes an order bill of lading in which the carrier agrees to deliver the goods to the order of some third person, the seller does not intend delivery of the goods to the carrier to be a final and complete appropriation of the goods to the contract, but intends it to be an appropriation conditional upon the buyer's paying the price. The seller instructs the third person not to indorse the bill of lading to the buyer, until the latter pays the price for the goods. Often the seller selects a bank in the buyer's town as the third person for this purpose. Usually he has drawn a draft on the buyer for the price and gets a bank in his town to discount it, and, as security, has the bill of lading run to the order of that bank or its correspondent bank in the buyer's town, so that the bank may indorse the bill to the buyer if he pays the draft or if he does not pay it, so that the bank can dispose of the bill of lading or the goods to others, and in that way reimburse itself for discounting the draft. The bank is sufficiently protected by having the bill of lading run to its order, as the carrier will not deliver the goods to any one without first obtaining surrender of the order bill. The bank in such cases has what is known as a security title in the goods.

§ 122. Effect of a Direction in an Order Bill of Lading to Notify Some Other Person. When the bill of lading names as consignee some person other than the buyer, it is usual for the carrier to agree to deliver the goods to the order of the person named as consignee but to notify some other person. That other person is the buyer and the purpose of such a direction on the bill of lading is so that the buyer may have means of knowing when the goods arrive. Without such a direction, the carrier would send an arrival

notice only to the consignee, and then he in turn would notify the buyer, but in this way notification to the buyer may be much delayed. Both the seller and the third person named as consignee want the goods taken off their hands and settlement of the price made as soon as possible. Therefore, the carrier is directed to deliver the goods only to the order of the third person named in the bill but to notify the purchaser of the arrival of the goods. Such a direction in the bill of lading is not equivalent to naming the buyer as consignee, nor does it pass title or any property interest in the goods to him. *Furman vs. Union Pac. R. R. Co.*, 106 N. Y. 579; *Pisapia vs. Hartford Transp. Co.*, 62 Misc. 607. "It rather suggests that he is not to be allowed possession of the goods until payment is made to the consignee. Accordingly, the carrier may refuse to deliver to the person to be notified, unless authorized by the consignee, and, indeed, if the carrier, without authority, should deliver the goods to the person to be notified it is liable for so doing." *Williston on Sales*, Sec. 287; *Bank of Commerce vs. Bissell*, 72, N. Y. 615.

§ 123. Effect of Order Bill of Lading to Seller's Order.

If the seller could be perfectly sure that the buyer would pay the price, there seems no reason why he should not make a straight consignment to the latter. Generally, the seller's purpose in taking a bill of lading to his own order is that, although he intends to appropriate the goods to the contract by delivering them to the carrier, he does not intend that delivery of the goods to the carrier shall be a final and unconditional appropriation, but rather an appropriation conditional upon the buyer's paying the price. He knows that the buyer cannot obtain the goods from the carrier without the bill of lading indorsed to him or his order, and hence in this way the seller may keep his hold on the goods for the price. But in the meantime, what is the state of title? Subd. 2, Sec. 101, provides, "Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods."

Does this mean that where the seller takes a bill of lading to his own order, the buyer acquires no title or interest in the goods upon shipment, other than a contract right for damages, if the seller does not complete the contract? It would seem not, in view of the rest of Subd. 2,

Sec. 101, which reads, "But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be *only* for the purpose of securing performance by the buyer of his obligations under the contract."

This would seem to indicate that if the facts were such that title would have passed to the buyer upon shipment, as, for example, in a sale f. o. b. point of shipment, the seller by taking a bill of lading to his own order continues to hold the title **for a single purpose only**. The inference is that title and interest **for all other purposes** passed to the buyer upon shipment.

Such a reservation of title in the seller by his taking a bill of lading to his own order is sometimes spoken of as a **security** title and is analogous to the title reserved by the seller in a conditional sale contract. We have seen (Sec. 47, *supra*) that in conditional sale contracts, although the seller reserves title in the goods until the condition be performed, his title is for security purposes only; a property right in the goods themselves and not merely a contract right passes to the buyer. As in conditional sales the seller may reserve a security title in himself, by the terms of the contract, while a property right and consequent risk of loss pass to the buyer, even before the condition is performed—so, in contracts for the sale of goods which are to be shipped to the buyer through a carrier, the seller may, by the terms of the bill of lading, show that delivery to the carrier was intended only as a *conditional* and not as an absolute appropriation of the goods to the contract; and he may, by the form of the bill of lading, reserve a security title or right to possession of the goods until the condition is performed, although a property right with the resultant risk of loss is in the buyer while the goods are in transit. See Subd. a, Sec. 103, Pers. Prop. Law, which provides: "Where delivery of goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract, and the property in the goods has been retained by the seller, merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery."

In the case of *Rosenberg & Co. vs. Buffum Co.*, 234 N. Y. 338, where the sale was f. o. b. point of shipment, and the seller took a bill of lading to his own order, it was held that upon the buyer's refusal to pay the price upon tender of the goods, the seller could recover the full purchase price as if title has passed, and not merely the difference between the

contract price and the market price of the goods, as if title had not passed and it were only a breach of contract on the buyer's part. In that case the Court of Appeals said, after stating the general rule to be that in a sale f. o. b. point of shipment, title passes to the buyer upon shipment: "The mere fact that the seller takes the bill of lading in his own name is not sufficient to show a contrary intention." Generally, the seller can recover the price only where the ownership has passed to the buyer, but when the seller retains security title by taking a bill of lading to his own order, the complete ownership in the goods has not passed until the buyer pays the price, and in the case under discussion, the buyer refused to pay the price. In order to avoid this difficulty, the Court decided that for the purpose of holding the buyer liable for the full purchase price where the goods are tendered to him, they would hold that title passed to him on shipment, notwithstanding the seller took a bill of lading to his own order. In speaking of this case, Williston says in *Sales*, Sec. 280b: "It has indeed been said by the New York Court of Appeals in *Rosenberg vs. F. S. Buffum Co.*, 234 N. Y. 338, that the fact that the seller is consignee does not indicate an intention inconsistent with the transfer of the title to the buyer. The statement was made in order to reach the sound result that the seller could recover the price when he tendered the bill of lading though the buyer refused it and to avoid the difficulties alluded to *infra*, Sec. 560b. The result might, it seems have been better reached as suggested in that section." In Sec. 560b, Williston points out that Sec. 103 (a) Pers. Prop. Law, imposing risk of loss on the buyer under such a shipment, necessarily indicates that the price may be recoverable, though the seller still retains a security title.

It should be observed in the *Rosenberg* case, *supra*, that the contract provided that "notwithstanding shipped to seller's order, goods are at risk of buyer from and after delivery to the carrier." It was held that that clause showed that the parties intended title to pass upon delivery of the goods to the carrier and the fact that the seller took a bill of lading to his own order does not show a contrary intention. That would be true even if there were no such clause in the contract, because that clause merely provided what Subd. a of Sec. 103 provides in regard to every shipment where the seller takes a bill of lading to his own order; namely, that the risk of loss is on the buyer. The Court said that if the goods were lost in transit the seller could clearly recover the full

purchase price where he retained security title in himself. It cannot be supposed that such a seller should be allowed to recover the price when the goods are destroyed, and yet denied full recovery when they are actually tendered, merely because he has reserved a security title in himself.

It would therefore appear that in a sale f. o. b. point of shipment, where the seller takes a bill of lading to his own order, title passes to the buyer upon shipment as far as risk of loss and liability to pay the purchase price is concerned, but title remains in the seller as far as is necessary to secure performance by the buyer of his obligations (i. e., security title remains in the seller) and as far as disposing of the goods to others is concerned in the event that the buyer does not perform his obligations. It seems incongruous to say that there can be two kinds of title or interest to the same goods but the law also recognizes such a situation in the cases of conditional sales and in common-law mortgages.

Writing on this point Williston in Sales, Sec. 286b says: "The root of the difficulty is the failure to grasp the idea that more than one person can have a property right in the same goods. It has seemed hard for the courts to understand that both seller and buyer have incidents of ownership. It is too often apparently taken for granted that one party, or the other must have title, and that the other can have only a contract right; yet the illustrations in the law of divided incidents of ownership are so numerous that there seems little excuse for misunderstanding. Equity has built up a whole system of jurisprudence based on the idea of one party having the legal title and the other the beneficial incidents of ownership; and it should not be supposed that the essential features of such a relation are peculiar to equity. A mortgage or a security title is not different in its nature when it relates to personal property and when it relates to land. Nor should it make any difference in the essential rights of the parties in what form the security title is held, whether by way of a purchase money mortgage, or a conditional sale, or a bill of lading running to the seller's order, or to the order of a banker who is financing the transaction for the seller."

§ 124. Can a Seller Who Has Taken the Bill of Lading to His Own Order, By Selling the Shipped Goods or Bill of Lading to An Innocent Third Person Purchaser for Value, in Violation of His Contract with the Buyer, Give Good Title to the Third Person as Against the Buyer? If the facts were such that title would not have passed to the

buyer upon shipment, and the seller takes the bill of lading to his own order, it is clear that he has the *jus disponendi* or right of disposal of the goods, and may not only retain the goods until the buyer performs his obligation under the contract, but may, even in violation of the contract, dispose of them to third persons. If the seller does this, of course he is liable in damages to the buyer, but the second purchaser from the seller acquires an indefeasible right.

In the case of *Wait vs. Baker*, 2 Ex. 1, it would appear that the object of the seller in taking a bill of lading to his own order was to retain the full rights of ownership in the goods, and, therefore, when in violation of this contract with the buyer, he sold the goods after they had been shipped on the buyer's vessel, to an innocent purchaser for value, it was held that the latter was entitled to the goods as against the buyer. Where it is apparent that the seller, in taking out a bill of lading to his own order, intended to retain the full rights of ownership, the buyer gets no property right or interest in the goods and can avail himself of no action based upon ownership, and if the seller wrongfully refuses to carry out the bargain by transferring the goods to others, the buyer has no redress other than an action for breach of contract.

In *Pottash vs. Cleveland-Akron Bag Co.*, 197 App. Div. 763, we have another case in which the seller's act in taking the bill of lading to his own order was held not to be merely for the purpose of securing performance by the buyer of his obligations under the contract. In that case the sellers sold to the buyer goods which were in the possession of a third person from whom they had purchased them, and gave to the buyer a delivery order on the third person for the same. The goods were subsequently shipped by the third person to the buyer under a bill of lading to the seller's order, which was forwarded to the sellers who indorsed it in blank, attached to it a draft on the buyer for the price, and delivered the bill of lading to a bank which paid them the amount of the draft. This bank forwarded the draft with the bill of lading attached to a bank in the buyer's town, but the buyer refused to pay the draft. The sellers brought an action against the buyer to recover the purchase price on the ground that title had passed on two theories: (1) by giving to defendant the delivery order, (2) by presenting to defendant a draft for the purchase price to which was attached a bill of lading, showing shipment of the goods to the order of the plaintiffs. It was held that it was error for the Court

to direct a verdict for the plaintiffs. The Court said: "The plaintiffs' subsequent dealings with the goods entirely negatived the claim that with the delivery of this order title to the goods passed to the defendant. The shipment of the goods to order of the plaintiffs was inconsistent with title in the defendant. Although this may have been an error on the part of George S. Bush & Co. Inc. (the custom house brokers) nevertheless plaintiffs took advantage of the situation, delivered the order bill of lading indorsed in blank to the bank and received the purchase price from it, thereby vesting it with title to the goods, which the plaintiffs could not have done unless they had title. These subsequent acts show that the plaintiffs knew that they had not parted with title by giving to the defendant the delivery order.

"Had the goods been delivered to the carrier and a straight bill of lading received or a bill of lading to the order of the buyer then the delivery to the carrier would have been a delivery to the buyer. But where, as in this case, the goods are consigned to the seller, and the bill is issued to the seller's order, title or right to possession does not pass to the buyer, but remains in the seller. (Pers. Prop. Law, Subd. 2, Sec. 101; *Boss vs. Hutchinson*, 182 App. Div. 88, 90) . . . The plaintiffs cannot claim that their property shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract (Pers. Prop. Law, Subd. 2, Sec. 101), because they exercised the right of disposition, and transferred the title and right of possession to the bank and notified the defendant that 'we have nothing further to say on this particular lot'. Therefore, title did not pass at all to the defendant. The bill of lading was tendered with a draft attached. The title was then in the bank and would not pass to the defendant except on payment of the draft. (*Commercial Bank of Keokuk vs. Pfeiffer*, 108 N. Y. 242, 250; Pers. Prop. Law, Secs. 214, 215, 218)."

But where the circumstances are such that were it not for the form of the bill of lading, the property would have passed, the object of the seller in reserving the property is, it may safely be assumed, simply to secure himself in regard to the performance by the buyer of the latter's obligations. The effect of naming himself as consignee in the bill of lading should not be greater than is necessary to effectuate the purpose of the parties. This purpose is to reserve the property for security only, and he is not, or should not, be at liberty to dispose of the goods to others until the buyer

has defaulted in paying the price. Moreover, upon satisfying his obligation, the buyer should get a right to the goods themselves, no matter in whose hands they have come. "This right is in its nature an equitable property right, similar to that of a mortgagor in jurisdictions where the mortgagee is conceived of as having the legal title. Therefore, if the seller or a banker representing his interest by assignment or as an agent, refuses to turn over the goods by indorsing the bill of lading or otherwise, when payment of a draft for the price is tendered, the buyer may maintain an action for the goods themselves." Williston on Sales, Sec. 284. If the seller, as often happens, after retaining a security title by taking a bill of lading to his own order, discounts at a bank a draft on the buyer and indorses the bill of lading to the discounting bank, the bank becomes the assignee of the seller's security title, and subject to the same duty as the seller, to turn over the bill of lading to the buyer on receiving the price, to secure which the bill of lading is held.

In *Mirabita vs. Imperial Ottoman Bank*, 3 Ex. Div. 164, a cargo of umber was shipped by the sellers who retained a bill of lading made out to their own order. A bill of exchange for the price was drawn upon the plaintiff, the buyer, which he at first refused to accept, but afterwards he tendered the price and demanded delivery of the bill of lading. The defendant bank which had discounted the bill of exchange and taken the bill of lading as security refused to accept payment of the price and sold the cargo. The plaintiff brought action for conversion and was allowed to recover. The Court pointed out that although delivery to the buyer's ship was only a conditional appropriation, because of the fact that the sellers took a bill of lading to their own order, the condition was performed when the plaintiff, the buyer, tendered payment of the draft and title then passed to the plaintiff. The Court distinguished *Wait vs. Baker*, supra, by saying that in that case the seller never intended title should pass until he handed the bill of lading to the buyer on such terms as he chose to exact. There was still a dispute as to the terms of payment and the seller did not intend that title should pass until that was settled. But in the *Mirabita* case, all the terms of payment had been settled at the time of the bargain and it was the intention of the sellers that the appropriation should become absolute and title pass to the buyer on payment or tender of payment of the price.

Although strictly speaking, where there has been a reservation of security title by the seller taking a bill of lading to his own order, title does not pass until the buyer pays the price, still as a practical matter title should pass when the buyer tenders the price, so that he can obtain the goods or their value in the same way that it is held title passes when the seller tenders the draft and bill of lading to the buyer so that he can recover the full purchase price. *Rosenberg & Co. vs. Buffum Co.*, 234 N. Y. 338.

Speaking of the *Mirabita* case, Williston says: "A distinction was taken between the cases previously cited, where it was said the seller had the power of absolutely disposing of the cargo, and a case where the seller retains the bill of lading simply to secure payment of the price. In the latter case it was said on payment or tender by the purchaser there is a performance of the condition subject to which an appropriation was made and everything which is necessary to transfer the property is done, and the property passes to the purchaser. The ground of decision adopted in *Mirabita vs. Imperial Ottoman Bank*, moreover, would lead to the conclusion not only that the buyer could sue the seller for conversion but could also sue the third person to whom the defendant had sold the cargo, since the Court says the property has passed to the plaintiff, . . .". Williston on Sales, Sec. 283.

In summing up the right of a seller who has taken a bill of lading to his own order to dispose of the goods to others in violation of his contract with the buyer, Williston on Sales, Sec. 286b, says: "The vital incidents of a situation where goods are shipped under such circumstances that were it not for the fact that the bill of lading makes the goods deliverable to the seller or a banker, the entire property in them would pass to the buyer, are these:

"1. The seller or person financing the transaction has the legal title so that he can convey the property even in violation of his duty to the buyer. This has generally been recognized, the seller's power being often given the vague name of *jus disponendi*, and this power he may transfer to a bank.

"2. The buyer bears the risk and has the beneficial incidents of property; and as against any one but an innocent purchaser for value of the bill of lading from the consignee, may maintain trover; or analogous action based on ownership, on making tender of the price."

But although the title thus reserved to the seller, it is

true, is the legal title; nevertheless, in view of Subd. 2, Sec. 101, which provides, "But if, except for the form of the bill, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed *only* for the purpose of securing performance by the buyer of his obligations under the contract," it would seem that if all that the seller intends by taking a bill of lading to his own order is to secure payment of the price, he has not the right of disposing of the goods to others in violation of his contract with the buyer and his attempt to do so will not deprive the buyer of his right to the goods.

§ 125. **Parol Evidence of Intention at Variance with Form of the Bill of Lading.** It is universally admitted that the form of the bill of lading is at least strong evidence of the intent of the seller in regard to the transfer or retention of the property. *Moors vs. Kidder*, 106 N. Y. 32. The courts have generally been disposed, however, to assent that this evidence was not conclusive. *The Carlos F. Roses*, 177 U. S. 655. So far as any litigation between the original parties to the transaction is concerned, this rule merely amounts to this, that the parol evidence rule does not debar the parties from showing their actual intent, whatever the form of the bill of lading. *First National Bank vs. Ege*, 109 N. Y. 120; *Commercial Bank vs. Pfeiffer*, 108 N. Y. 242. And the rule is the same as against any one who is not a **bona fide** purchaser for value without notice. *Garvin Inc. vs. N. Y. C. R. R.*, 210 Mass 275.

Even between the original parties, however, it is the intention expressed by one party to the other which alone is material, and if a seller from whom goods have been ordered or who has contracted to sell them consigns them to the buyer, the latter is justified in assuming that the seller is assenting to a transfer of ownership; and after such a consignment retention by the seller of a straight bill of lading or his transfer of it to a bank as security cannot limit the buyer's rights. *Wigton vs. Bowley*, 130 Mass. 252. But see *American Nat. Bank vs. Warren*, 96 Misc. 265.

If, however, the seller on shipment of the goods makes it clear, not merely to a third person like a bank but to the buyer himself, that the ownership is not to pass until the price is paid or other condition performed, the fact that the goods are consigned to the buyer, or that an indorsed order bill of lading is sent to him, will not enable him to assert ownership against the seller until the condition has been performed.

CHAPTER XI.

SELLER'S RETENTION OF CONTROL OVER GOODS
AFTER SHIPMENT BY FORM OF AND DEALING
WITH BILL OF LADING.

§ 126. **Reservation of Right of Possession or Property When Goods are Shipped.** Often where the contract calls for the seller to ship the goods to the buyer, he wishes to retain his hold on the goods for the price while they are in the carrier's hands; i. e., he intends that the buyer shall not obtain the goods from the carrier until he pays the price. We have already seen that he may do this by shipping the goods c. o. d. There are other means of accomplishing this result, and they are found in Sec. 101 of the Pers. Prop. Law. The first subdivision of that section reads as follows:

"1. Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer."

The other subdivisions of section 101 provide for the means by which the seller may retain his hold on the goods for the price. They are:—

(1) take a bill of lading to his own order, indorse it in blank and mail it with a draft attached to a bank in the buyer's town with instructions to deliver the bill of lading to the buyer when he pays or accepts the draft. The seller thereby, as we have seen in the preceding chapter, reserves security title in the goods until the draft is paid or accepted. Subd. 2 of Sec. 101.

(2) take a bill of lading to the buyer's order and mail it with a draft attached to a bank in the buyer's town with instructions to deliver the bill of lading to the buyer when he pays or accepts the draft. Here title passes to the buyer on shipment (Sec. 226, Subd. a). The seller does not reserve security title but he does retain the right to the possession of

the goods as against the buyer until the draft is paid or accepted. Sec. 101, Subd. 3.

(3) take a bill of lading to his own or to the buyer's order and mail it with a draft attached directly to the buyer. Here the buyer is bound under Subd. 4 of Sec. 101, to return the bill of lading if he does not honor the draft and he has no right to detach the draft and present the bill of lading to the carrier for the goods until he has honored the draft. *Whitney vs. McLean*, 4 App. Div. 449.

(4) take a bill of lading to the order of some third person usually a banker in the buyer's town or take a bill of lading naming such third person as consignee with a direction to the carrier to notify the buyer. Secs. 121, 122 in Chapter X.

If the seller wants it to be a condition to the buyer's acting on the bill of lading that he first pay for the goods, such an intention in order to be recognized should be shown in one of the ways provided for in Sec. 101 of the Pers. Prop. Law. Therefore, if the seller, after taking a straight bill of lading naming the buyer as consignee, attaches a draft to it and mails it to a bank in the buyer's town with instructions not to deliver it to the buyer until he pays the draft, he will not succeed in recovering the goods from the buyer if the latter obtains the goods from the carrier and does not pay the draft. *Wigton vs. Bowley*, 130 Mass. 252.

We have already seen that Subd. 2 of Rule 4 of Sec. 100 declares that delivery to the carrier is an unconditional appropriation of the goods to the contract except in the cases provided for in Rule 5 and in Sec. 101. Taking the two sections together, they mean that when the seller takes a bill of lading to his own order, delivery to the carrier is only a conditional appropriation, conditional on the buyer paying the price before taking the goods from the carrier. As soon as this condition is performed, the appropriation becomes absolute and title will pass to the buyer. And it has been held that the buyer need not actually pay the price in order for that result to follow. It is sufficient if the buyer tenders the price, although the seller or the seller's indorsee of the bill of lading refuses to accept payment. *Mirabita vs. Imperial Ottoman Bank*, (1878) L. R. 3 Ex. Div. 164.

We will now consider more in detail each of the three methods provided for in Sec. 101, by which the seller may retain a hold on the goods for the price.

§ 127. **By Taking Bill of Lading to Seller's Order.** We have already discussed this method in Sec. 123, *supra*.

§ 128. **By Retaining Bill of Lading to Order of Buyer.** The second method—i. e., of taking the bill of lading to the order of the buyer but retaining possession of the bill of lading, is provided for in Subd. 3 of Sec. 101, as follows: "Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods as against the buyer."

If the seller takes a straight bill making the goods deliverable to the buyer, the retention of the bill of lading by the seller is useless, because the buyer does not need the bill to get possession of the goods as the carrier is justified in delivering the goods to him without demanding surrender of the bill of lading. Secs. 197 and 198, *Pers. Prop. Law*.

If, however, the bill of lading makes the goods deliverable to the order of the buyer, although the property in the goods passes to the buyer, he is unable to obtain the goods from the carrier without first surrendering the bill of lading. Sec. 198, *Pers. Prop. Law*. Therefore, the retention of the bill by the seller, under such circumstances, controlling as it does the possession of the goods, is closely analogous to the retention of a lien by the seller after the property has passed to the buyer. *Williston on Sales*, Sec. 285; *Commercial Bank vs. Pfeiffer*, 108 N. Y. 242.

By Subd. 3 of Sec. 101, it is provided that where, although the bill of lading is to the buyer's order, the seller or his agent retains the bill of lading, the seller thereby reserves a right to the possession of the goods as against the buyer. He does not reserve the title, not even a security title, by doing so, but only a right to the possession of the goods as against the buyer. Although complete title has passed to the buyer, the seller by retaining the bill of lading has reserved a right to the possession. That right is assignable and the seller by indorsing the bill of lading to a bank as security for discounting a draft drawn on the buyer for the price, may assign the right to the possession of the goods to the bank, so that if the buyer should obtain delivery of the goods from the carrier without the bill of lading, the bank may sue either the buyer or the carrier for conversion in interfering with its right of possession to the goods.

§ 129. By Naming Some Third Person As Consignee.

Where the seller is anxious to secure an immediate advance on the strength of the shipment, he will often arrange with a bank to discount a draft which he draws upon the buyer for the price, and he will then take out a bill of lading naming that bank as consignee, in order that the bank may have security for the payment of the draft by the drawee buyer. The bank will then forward the bill of lading indorsed in blank and draft to a correspondent bank in the buyer's town with instructions to indorse the bill of lading to the buyer when he pays the draft, if it is a sight draft, or when he accepts it, if it is a time draft. For the success of this method, it is immaterial whether the bill of lading is a straight bill or an order bill. For, if it is an order bill, the carrier will not deliver the goods to the buyer until he surrenders the order bill, and this he cannot do until he satisfies the bank who holds the bill of lading. Even if it is a straight bill of lading naming the bank as consignee, the carrier will not deliver the goods to the buyer, because he is not named as consignee. Not until the buyer gets an order from the consignee, the bank, will the carrier deliver the goods to him; and the bank will not give him such an order until he pays the draft.

Under this device, the bank named as consignee and which has discounted the draft has legal title to the goods for purpose of security, but the beneficial interest is in the buyer, for the buyer has agreed to buy the goods in question and has authorized the seller to appropriate them to him. *Farmers' & Mechanics' Bank vs. Logan*, 74 N. Y. 568; *Moors vs. Kidder*, 106 N. Y. 32. If the third person is a banker and is tendered the amount of his advances by the person for whose account the goods were shipped, he is bound to surrender the goods, although he had no contractual relation with the claimant. The latter's right, therefore, must evidently be a property right. *Williston on Sales*, Sec. 286; *Drexel vs. Pease*, 13 N. Y. 129.

§ 130. By Forwarding Bill of Exchange with Bill of Lading to Seller's or Buyer's Order.

If the seller is not anxious for an immediate advance upon the goods, or if his bank is unwilling to discount the draft, the seller may take a bill of lading either to his own or to the buyer's order, drawing a draft on the buyer for the price and forwarding the bill of lading and the bill of exchange *together*, either to some third person with instructions to indorse or deliver the bill of lading to the buyer when he pays the draft, or he may

send them directly to the buyer. Of course, if the seller sends the bill of lading and draft to a third person, he is protected, because the buyer cannot get the goods from the carrier without first surrendering the bill of lading and the third person has the bill of lading.

But the seller is also protected, if he sends the bill of lading and draft directly to the buyer. Where two documents are sent together, the fair construction to be put upon the seller's conduct is that he makes a conditional offer—an offer of the bill of lading conditional upon the payment or acceptance of the draft. *Marine Bank vs. Wright*, 48 N. Y. 1. Accordingly, it is provided in Subd. 4 of Sec. 101 that "where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading together to the buyer to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of exchange, he acquires no added right thereby."

Where the documents are sent separately by different channels, they cannot be expected to arrive at the same time; e. g., where the seller, instead of transmitting the bill of lading and bill of exchange together, sends the bill of lading directly to the buyer, notifying the latter of a bill of exchange drawn simultaneously which is to be forwarded through a bank. Under such circumstances, in the absence of express statement to that effect, there is no reason to suppose that the seller intended to make the delivery of the bill of lading conditional upon the honoring of the bill of exchange. *Williston on Sales*, Sec. 289.

But in spite of the statutory protection given the seller when he sends the bill of lading and draft directly to the buyer, it will readily be seen that sending the documents to some person other than the buyer is the only safe method, for if they are sent directly to the buyer, he may obtain the goods without paying the draft, and the seller, even if he has a good right of action against the buyer on this account, is compelled to enter upon litigation in order to enforce his rights, whereas if the bill of lading and draft are sent through a third person, ordinarily a bank, the buyer is unable to obtain the goods without paying the price. *Williston on Sales*, Sec. 289.

§ 131. **Whether a Draft Attached to a Bill of Lading Must Be Paid Before Third Person Indorses or Delivers Bill**

of Lading to buyer, or Need It Be Only Accepted. It is provided in Sec. 227, Pers. Prop. Law, that if the draft which accompanies the bill of lading is payable on demand or at sight, or not more than three days thereafter (whether such three days be termed days of grace or not), the bank or other third person to whom the draft and bill of lading are sent must hold the bill of lading until the draft is paid; but if the draft is payable on time, extending beyond three days, either of grace or otherwise, then acceptance of the draft by the buyer is sufficient to justify the bank or third person in surrendering the bill of lading to the buyer, in the absence of a contrary intention.

§ 132. **Effect, as Between Buyer and Seller, of Buyer's Detaching Draft From Bill of Lading and Obtaining the Goods without Paying the Draft.** "Though the buyer has been intrusted with the possession of the bill of lading, only upon condition of payment of the draft, he nevertheless has the power, without payment, to obtain the goods and deal with them. In any litigation, under these circumstances between the seller and buyer, it cannot be doubted that the seller must prevail. The intent of the seller is clearly indicated by the attachment of the draft to the bill of lading, and the buyer, knowing that intent, cannot take advantage of his possession of the bill of lading to any greater extent than the offer of the seller authorizes." Williston on Sales. Sec. 292.

Unauthorized separation of bill of lading from draft of seller does not give buyer title to the goods. *Pottash vs. Cleveland Akron Bag Co.*, 197 App. Div. 763.

§ 133. **Effect, as Between Seller and Innocent Purchaser for Value of the Bill of Lading or the Goods from the Buyer Who Has Detached the Bill of Lading from the Draft, or has Obtained the Goods without Paying the Draft Attached to Bill of Lading.** Where the seller has sent the bill of lading with draft attached directly to the buyer and the buyer wrongfully detaches the bill of lading from the draft and sells the bill of lading or the goods to an innocent purchaser for value, the seller no longer can recover the goods, although he still has an action against the buyer for the price. This is for the reason that the seller by sending the bill of lading to the buyer's order directly to the buyer, even with a draft for the price attached, has made it possible for the buyer, by detaching the draft, to appear to be the owner of the goods, and the maxim applies that where one of two innocent persons must suffer, he should suffer whose act

brought about the perilous situation. This is provided for in the last sentence of Subd. 4, Sec. 101, as follows: "If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is indorsed in blank, or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill of lading or goods from the buyer will obtain the property in the goods, although the bill of exchange has not been honored, provided that such purchaser has received delivery of the bill of lading indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful."

CHAPTER XII.

TRANSFER OF TITLE BY NEGOTIATION OR TRANSFER OF DOCUMENTS OF TITLE.

§ 134. What are Documents of Title? Goods which are in transit or in storage are often sold or pledged by delivery of the bill of lading or warehouse receipt. Bills of lading and warehouse receipts when so used are called documents of title. Sec. 156, Pers. Prop. Law, defines a document of title to goods as "any bill of lading, dock warrant, warehouse receipt, or order for the delivery of goods, or any other document used in the ordinary course of business in the sale or transfer of goods, as proof of the possession or control of the goods, or authorizing or purporting to authorize the possessor of the document to transfer or receive either by indorsement, or by delivery, goods represented by such document."

The theory upon which the property may be transferred by such documents is that the document represents the goods, is a symbol of the goods, and the delivery of the document is in effect, a delivery of the goods. The Supreme Court of the United States has said that bills of lading "are so much cotton, grain, iron, or other articles of merchandise, in that they are symbols of ownership of the goods they cover." *Friedlander vs. Texas etc., R. Co.*, 130 U. S. 416. This is true, however, only of *negotiable documents of title*.

A negotiable document of title is one in which it is stated that the goods referred to therein will be delivered to the bearer or to the order of any person named in such document. Secs. 108, 191, Pers. Prop. Law; Secs. 92, 94, Gen. Bus. Law; Sec. 3, Pomerene Act. Any provision inserted in a negotiable bill of lading or negotiable warehouse receipt that it is non-negotiable will not prevent its being negotiable nevertheless. Secs. 111, 191, Pers. Prop. Law; Secs. 92, 94, Gen. Bus. Law; Sec. 3, Pomerene Act.

Negotiable bills of lading and negotiable warehouse receipts may be used as symbols of the goods, i. e., as a means of transferring the title to the goods, for the reason that they in fact control the possession of the goods, since the carrier or warehouseman will not deliver the goods without the surrender of the document. Sec. 198, Pers. Prop. Law; Secs.

96, 97, Gen. Bus. Law. But this reason fails when applied to a delivery order. "Delivery orders upon warehousemen do not control possession of the goods. There is nothing to prevent the bailor from issuing a dozen delivery orders for the same goods, and then going to the bailee and getting the goods himself." Williston on Sales, Sec. 405a. Especially is this so, where the bailor, who purports to sell the goods by a delivery order, retains the negotiable warehouse receipt issued for them. It has, therefore, been held that a delivery order upon a warehouseman is not a document of title where the seller retains the warehouse receipt. *Kirsh vs. Roulston*, 178 N. Y. S. 246; *Anderson vs. Read*, 106 N. Y. 333. In *Pottash vs. Cleveland Akron Bag Co.*, 197 App. Div. 763, the plaintiffs who had contracted to sell 100 bales of burlap to the defendant executed a delivery order for the same on a custom house broker, in whose name they were stored on a dock at Seattle; indorsed the delivery order to the defendant; attached a draft thereto, drawn on the defendant for the price; and forwarded the order and draft through a bank to the defendant. This delivery order did not identify any particular bales by marks or numbers to distinguish them from other bales which had been received on the same steamship. It was held that the delivery order did not pass title to the goods because (1) it did not sufficiently identify the goods, and (2) because the plaintiffs thereafter dealt with the delivery order in such a way as to negative the intention that title should pass with delivery of the order. It should be noticed that in this case there was no outstanding negotiable document of title retained by the plaintiffs after they had forwarded the delivery order, and the Court said by way of *obiter dictum*: "Undoubtedly, if the plaintiffs had delivered to the defendants a sufficient order on the persons having custody of the goods so that on presentation thereof at the dock in Seattle it would have been entitled to the immediate possession of the 100 bales, that would have been a good delivery under the contract, the property in the goods would have passed to the defendant and the plaintiff could have maintained an action for the price. It was testified by the plaintiffs' expert that to make a delivery order good according to the custom of the trade, the particular bales would have to be specified and distinguished by number or marks, and the mere fact that it said on a certain ship would be sufficient."

A straight or non-negotiable bill of lading or a non-negotiable warehouse receipt cannot safely be used as a

symbol of the goods, i.e., as a means of transferring the property, because since the bailee is bound to deliver the goods to the consignee or person named therein without demanding presentation or surrender of the document, such a document does not control the possession of the goods.

§ 135. **Statutes Governing Transfer or Negotiation of Documents of Title.** Four statutes must be consulted in reference to the transfer or negotiation of documents of title — (1) the provisions of Sec. 108-121, incl., Pers. Prop. Law, which are general, applying to bills of lading, warehouse receipts, or any other documents termed a "document of title" in Sec. 156, Pers. Prop. Law; (2) the provisions of Secs. 187-241, incl., Pers. Prop. Law, which apply to intra-state bills of lading; (3) the provisions of Sec. 90-143, Gen'l Bus. Law, which apply to warehouse receipts; (4) the provisions of the Federal Bills of Lading Act, commonly known as the Pomerene Act of August 29, 1916, ch. 415, 39 Stat. 538, which apply to bills of lading issued by a common carrier for the transportation of goods in any territory of the United States, or the District of Columbia, or from a place in a state to a place in a foreign country, or from a place in one state to a place in another state, or from a place in one state to a place in the same state through another state, or foreign country. And the provisions of the Federal Act govern even though suit is brought in a state court. *Baldwin vs. Childs*, 249 N. Y. 212. But the Pomerene Act does not cover bills of lading originating in a foreign country, though consigned to a place within the United States, for such a bill of lading would be governed by the law of the country in which it was issued. *Williston on Sales*, Sec. 406a.

§ 136. **How Documents of Title May Be Negotiated or Transferred so as to Pass Title to the Goods.** The term "negotiation" is properly used only in reference to documents negotiable in form. The word "transfer" is properly used only in reference to non-negotiable documents or to documents originally made out to order but not properly indorsed at the time of the transfer.

A person to whom a negotiable document of title has been *duly negotiated*, acquires thereby title to the goods. Sec. 114, Pers. Prop. Law. A negotiable document of title is *duly negotiated* (1) by *delivery* where by its terms the goods were to be delivered to bearer, or where it has been indorsed in blank or to bearer, Sec. 109, Pers. Prop. Law:

or (2) by *indorsement* of the person to whose order the goods are by the terms of the document deliverable, Sec. 110, Pers. Prop. Law. Similar provisions referring specifically to bills of lading are found in Secs. 214, 215, Pers. Prop. Law, and to warehouse receipts in Sec. 122, Gen. Bus. Law; Sec. 27, Pomerene Act.

If order documents are merely delivered to another when they require indorsement, the transaction amounts only to "a transfer." A transferee of an order document which lacks an indorsement secures a right to compel that indorsement. Secs. 116 and 220, Pers. Prop. Law; Sec. 127, Gen. Bus. Law; Sec. 33, Pomerene Act. The negotiation takes effect as of the time when the indorsement is actually made and title to the goods passes as of that time. Where the document negotiable in form is transferred without indorsement, the mere possession of it protects the holder's rights, for the bailee who issued the document will not surrender the goods unless the document is surrendered.

But neither the transfer nor indorsement of a straight bill of lading or non-negotiable warehouse receipt operates as a transfer of title to the goods for the reason that they do not control the possession of the goods as already explained. (Sec. 134 *Infra*.) Secs. 112, 216, Pers. Prop. Law; Sec. 123, Gen. Bus. Law; Sec. 29, Pomerene Act. But a person to whom such a document has been transferred has the right to notify the bailee who issued the document of the transfer and the bailee must thereafter hold the goods for him according to the terms of the document. But before such notification, the transferee's title may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor or by notification to the bailee of a subsequent sale of the goods by the transferor. Secs. 115, 219, Pers. Prop. Law; Sec. 126, Gen. Bus. Law; Sec. 32, Pomerene Act.

§ 137. **Negotiation of Negotiable Document of Title May Pass Title Where Delivery of the Goods Would Not.** The Sales Act provides that "a person to whom a negotiable document of title has been duly negotiated acquires thereby such title to the goods as the person negotiating the document to him had *or had ability to convey to a purchaser in good faith for value.*" Sec. 114, Pers. Prop. Law. In other words, if the person negotiating the document had no title at all, but was clothed with apparent ownership or had merely a voidable or defeasible title, the person to whom the

negotiable document of title has been duly negotiated will acquire, through the negotiation, the title a purchaser in good faith for value would have acquired. The Sales Act further provides that he "also obtains such title to the goods as the person to whose order the goods were to be delivered by the terms of the document had or had ability to convey to a purchaser in good faith for value." Sec. 114, Pers. Prop. Law. The corresponding sections of the Uniform Bills of Lading Act (Sec. 218, Pers. Prop. Law), of the Warehouse Receipt Act (Sec. 125, Gen. Bus. Law), Sec. 31, Pomerene Act, follow almost exactly the words of the Sales Act. The reason underlying these statutory provisions is that it is the policy of the law, as well as of business, to make an order bill of lading or order warehouse receipt a safe thing to buy or lend money on. We see further instances of this policy in the provisions of the Factors Act (Sec. 43, Pers. Prop. Law) that an unauthorized negotiation or transfer of a document of title by a factor intrusted with it for sale or pledge will transfer title to a purchaser for value without notice, even though the factor who negotiated or transferred it to him had no title. And under the combined effect of Secs. 119, 158, and 224, Pers. Prop. Law; Sec. 131, Gen. Bus. Law, and Sec. 37, Pomerene Act, a bona fide purchaser for value is protected as against the true owner even where he bought the document of title from a finder or a thief of the document or from one who had deprived the true owner of the possession of the document by fraud, accident, mistake, duress, or conversion.

It will thus be observed that an indorsee or transferee of a document of title may in certain instances acquire a better title than the indorsor or transferror could have given him by delivery of the goods, and that the indorsement or delivery of a document of title may transfer title when delivery of the goods could not. *Munroe vs. Philadelphia Warehouse Co.*, 75 Fed. 545; *Commercial Bank vs. Armsby*, 120 Ga. 74; *Williston on Sales*, Sec. 425.

§ 138. When Sale of Document of Title Cannot Transfer Property to the Buyer. There are four classes of cases where a sale of a negotiable document of title will not transfer property to the buyer even though the document was genuine and properly negotiated to him.

(1) Where the bailee never received the goods described in the document and it makes no difference that the bailee may have issued the document fraudulently, with no

expectation of receiving goods, or improvidently, expecting later to receive the goods. (See Sec. 146, *Infra*.)

(2) Where the depositor of the goods had no title to them. (See Sec. 147, *Infra*.)

(3) Where the goods have been destroyed after their receipt by the bailee, but prior to the negotiation of the document of title. (See Sec. 148, *Infra*.)

(4) Where the document was "spent," i. e. the goods delivered by the bailee, prior to the time of the negotiation of the document. (See Sec. 139, *Infra*.)

§ 139. **How Long an Order Bill of Lading or Warehouse Receipt Remains a Document of Title.** Title to the goods may pass by negotiation of an order bill of lading or warehouse receipt only as long as the document continues to have force and effect as a symbol of the goods, i. e. only so long as the document controls possession of the goods. If the goods have been delivered up by the bailee, this is no longer true.

The mere fact that the goods have arrived at their destination and been landed from the ship or freight car will not make a bill of lading ineffectual as a symbol of the goods as long as the carrier still has possession of the goods; for the carrier is then still under the duty to demand surrender of the order bill of lading before delivering the goods. *Barber vs. Meyerstein*, L. R. 4 H. L. 317.

In *Anchor Mill Co. vs. Burlington Ry. Co.*, 102 Iowa, 262, the seller shipped wheat under a bill of lading naming himself as consignee, but gave the buyer a special order on the railroad, dispensing with the need of the buyer presenting the bill of lading. The railroad delivered a car load of the wheat onto a side track for the buyer. The seller then drew a draft on the buyer for the price, attached it to the bill of lading and had the draft discounted at a bank, giving the bank the bill of lading as security. The buyer had removed a part of the wheat from the car when the bank notified the railroad that it held the bill of lading and claimed the wheat. The railroad, thereupon, notified the buyer not to take the wheat out of the car and removed the car back to its yards. The buyer brought an action against the railroad for conversion, claiming to be the owner of the wheat. In that action the bank filed a petition of intervention, claiming the wheat under the bill of lading. It was held that the lower court erred in directing a verdict for the bank, on the ground that the bill of lading was "a spent doc-

ument," i. e. had lost its effect as a symbol of the goods when it was transferred to the bank, for the carload of wheat was delivered to the buyer when it was put into the buyer's railroad siding. After that, nothing further remained to be done by the carrier as far as delivering the wheat was concerned. The bill of lading had served the purpose of its existence and was no longer a thing of value—it was a spent document prior to the time it was transferred to the bank and therefore the bank could get no right or title to the wheat through the negotiation to it of the bill of lading.

The rule that where the bill of lading is spent, i. e. where the goods have been delivered by the carrier, no title to the goods thereafter passes by negotiation of the bill of lading is recognized in New York. *National Commercial Bank vs. Lackawanna Trans. Co.*, 59 A. D. 270, aff'd 172 N. Y. 596. In that case the seller sold a quantity of oats to the buyer, shipped them and took a bill of lading to his own order. He indorsed the bill of lading in blank, attached a draft drawn on the buyer for the price, and mailed it to a bank in the buyer's town. The buyer paid the draft and the carrier delivered the oats without demanding surrender of the order bill of lading. The buyer was indebted to another bank, the plaintiff bank, which held certain securities of his in pledge for that debt. The bank consented to and did take the bill of lading as a substitute for those securities which it thereupon surrendered to the buyer. The buyer failing to pay its indebtedness to the bank, the latter presented the bill of lading to the carrier and demanded the oats. The carrier having previously delivered the oats to the buyer without demanding surrender of the bill of lading was unable to comply with the demand. The bank then brought an action against the carrier for conversion. It was held that the bank could not recover as upon delivery of the oats to the buyer who was the rightful owner of them, the functions of the bill of lading had ceased. It was contended on behalf of the bank that the carrier's delivery of the oats without demanding surrender of the order bill of lading was not only a breach of contract as between the immediate parties to the bill of lading but also as towards any one to whom the bill of lading might thereafter be assigned, and that by breach of that contract the bank had been induced to take a "spent" and worthless bill of lading and hence that an action lay against the carrier for the damages so sustained. But the Court said that as the action was for conversion and not for breach of contract, no recovery could be had on that theory.

The failure of the carrier to deliver goods on demand of a subsequent purchaser of the bill of lading should render the carrier liable on the ground of estoppel. The carrier has, by leaving the bill of lading outstanding, in effect, represented that the goods are still in its hands, and should therefore be estopped to show the prior delivery as an excuse for refusing to comply with the demand of a subsequent purchaser of the bill of lading for value and without notice.

It is now provided by Statute in New York (Sec. 200, Pers. Prop. Law) that where a carrier delivers the goods shipped under an order bill of lading without demanding surrender of the bill of lading, it shall be liable for failure to deliver the goods to one who later presents the order bill of lading, whether such person obtained assignment of the bill of lading before or after the delivery of the goods, and notwithstanding delivery was made by the carrier to the person then entitled to the goods. There is a similar statutory provision relating to warehousemen (Sec. 98, Gen. Bus. Law), and to interstate and foreign bills of lading, Sec. 11, Pomerene Act. Under these statutes, one who purchases a "spent" bill of lading or warehouse receipt does not get title to the goods—he gets only a right of action against the bailee to recover the damages he has sustained by failure of the bailee to demand surrender of the order bill of lading or order warehouse receipt before it delivered the goods.

§ 140. Effect on Title Passing of Negotiation or Transfer of One or More Parts of a Bill of Lading Issued in Sets. It was for centuries the custom to draw foreign bills of lading in sets, usually of three, and mail the parts by separate ships to the buyer. In the days of sailing vessels, ships were often lost at sea or delayed by calms and it was to avoid those consequences that foreign bills of lading were issued in sets of three. The mischief of that practice is obvious because each part is an original, and indorsement for value of the second or third part prevails over a later indorsement of the first part. *Barber vs. Meyerstein*, L. R. 4 H. L. 317. Even though the later indorsee obtains possession of the goods, the prior indorsee is entitled to claim them, *Barber vs. Meyerstein*, *supra*, though the carrier who delivers in good faith to the holder of any part is protected. Sec. 192 of the Pers. Prop. Law abolished the practice as far as inland and coast-wise trade bills of lading are concerned and even in case of foreign shipments the practice of issuing bills of lading in sets is now discontinued, as no one who buys one part can have any security that he is the first indorsee.

He must rely solely on the word of the man he is dealing with, not on the document. If a carrier issues inland or coastwise bills of lading in sets, it will be liable for failure to deliver the goods to any one who purchases a part of the bill of lading for value in good faith, even though the purchase be after the delivery of the goods by the carrier to a holder of one of the other parts. Sec. 192, Pers. Prop. Law.

§ 141. **Effect of Issuing Duplicate Bills of Lading.** Though domestic carriers do not issue bills of lading in sets, it is not uncommon for duplicates to be issued. The Supreme Court of the United States seems to have regarded the duplicate as in the nature of a copy. *Shaw vs. Railroad Co.*, 101 U. S. 557. But in New York a different practice has been followed. In *First Nat. Bank vs. Ege*, 109 N. Y. 120, it appeared that the shipper was accustomed to send original bills directly to the consignee, duplicates were retained and attached to drafts. In a suit against the consignee who had knowledge of the shipper's practice of sending drafts through a bank against the goods, it was held that the bank was protected. The Court seemed to regard the original and duplicate as parts of a set, saying "The practice of carriers in issuing duplicate bills of lading to consignors of property shipped for sale has been much disapproved by the courts, for the reason that it affords a convenient opportunity for the commission of frauds by consignors, as well as subjecting the carrier to the hazard of making incorrect delivery of the property." If more than one negotiable bill of lading is issued in New York State for the same goods for inland or coast-wise transportation, the carrier must place the word "duplicate" plainly on the face of every such bill except the one first issued or it will be liable to any one who has purchased the bill for value in good faith as an original, even though the purchase be after the delivery of the goods by the carrier to the holder of the original bill. Sec. 193, Pers. Prop. Law. Sec. 93, Gen. Bus. Law contains a similar provision as to warehouse receipts.

§ 142. **Who May Negotiate a Document of Title.** Under the Sales Act it was intended by the Commissioners on Uniform State Laws that a negotiable document of title might be negotiated by the owner thereof or by any person to whom the possession or custody of the document *had been entrusted by the owner* if that person had been named in the document as the person to whom the bailee undertook to deliver the goods or if the document was in such

form that it could be negotiated by delivery. Sec. 113, Pers. Prop. Law. It was not their intention that a finder or a thief of a document of title could pass title to an innocent purchaser for value, but only that one who had been *voluntarily entrusted* with the document by the owner could do so. Williston on Sales, Sec. 414.

But the Uniform Bills of Lading Act, Sec. 217, Pers. Prop. Law, and Sec. 30, Pomerene Act, however, extended the negotiability of such documents beyond the point indicated by the provisions of the Sales Act and the Warehouse Receipts Act, enacting broadly: "A negotiable bill may be negotiated by any person in possession of the same, however, such possession may have been acquired, if, by the terms of the bill, the carrier undertakes to deliver the goods to the order of such person, or if at the time of negotiation the bill is in such form that it may be negotiated by delivery."

But it should be noted that Sec. 158, Pers. Prop. Law (Sales Act) provides: "Nothing in this act or in any repealing clause thereof shall be construed to repeal or limit any of the provisions of the law to make uniform the law of warehouse receipts, or of the law, if enacted, to make uniform the law of bills of lading, or of section nine hundred and forty-three of chapter eighty-eight of the laws of nineteen hundred and nine, constituting chapter forty of the consolidated laws."

By virtue of this section, the inconsistency between the Sales Act (Sec. 113, Pers. Prop. Law) and the Bills of Lading Act (Sec. 217, Pers. Prop. Law) is removed, although the Bills of Lading Act became a law in New York on June 6, 1911, and the Sales Act not until June 30, 1911 (both acts having been passed by the legislature of 1911). The express saving clause of the Sales Act (Sec. 158, Pers. Prop. Law) would seem to prevent a repeal of Sec. 217, Pers. Prop. Law (Bills of Lading Act) by Sec. 113 of the same law (Sales Act).

The Warehouse Receipts Law contained a provision similar to that of Sec. 113, Pers. Prop. Law. This, however, was amended in 1924 so as to bring it in line with the broader negotiability idea of the Bills of Lading Act. The section (Sec. 124, Gen. Bus. Law) amended reads: "A negotiable receipt may be negotiated: by any person in possession of the same, however such possession may have been acquired, if, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of such person

or if at the time of negotiation the receipt is in such form that it may be negotiated by delivery." It will thus be seen that under the amended Warehouse Receipt Law one finding or stealing a negotiable warehouse receipt can give good title to it as against the true owner.

We may summarize by saying that negotiable bills of lading, whether interstate or intrastate, and negotiable warehouse receipts are now negotiable by a finder or thief and such negotiation will pass good title.

§ 143. Effect of Fraud, Mistake, Duress, or Larceny Upon Negotiation—Transfer of Bill of Lading or Warehouse Receipt for Special Purpose—Trust Receipt Notices. One to whom a negotiable document of title is negotiated or delivered gets such title as his indorser or transferrer had or had ability to convey to an innocent purchaser for value, Sec. 114, Pers. Prop. Law; and this holds true, even if the negotiation was a breach of duty on the part of the person making the negotiation, Sec. 119 and 224, Pers. Prop. Law, Sec. 131, Gen'l Bus. Law; or even if the owner of the document was induced by fraud, mistake, or duress to entrust the possession or custody thereof to such person, Sec. 119, Pers. Prop. Law; or even if the owner of the bill was deprived of the possession of the same by fraud, accident, mistake, duress, or conversion, Sec. 224, Pers. Prop. Law; or even if the owner of the warehouse receipt was deprived of the possession of the same by loss, theft, fraud, accident, duress, or conversion, Sec. 131, Gen'l Bus. Law, if the person to whom the document was subsequently negotiated paid therefor value without notice.

Frequently where banks have advanced money to the seller on documents of title, as where they have discounted a draft drawn on the buyer for the price and as security accepted bills of lading naming themselves as consignees, the buyer is not ready to pay the draft upon arrival of the goods. In order to prevent demurrage and storage charges, the goods must be promptly removed from the carrier's possession and stored until such time as the buyer is able to pay the draft. Ordinarily banks do not have facilities for so handling and storing goods. So it has been a common practice for such banks in such circumstances to entrust the bill of lading to the buyer, so that he may get the goods from the carrier, or through the custom house, and store them until such time as he is in a position to repay the bank the amount it has advanced on the goods. But in order to ac-

compish this purpose, it is necessary for the bank to indorse the bill of lading to the buyer, otherwise the carrier will refuse to deliver the goods to him. With such an indorsement, the buyer is in a position to fraudulently, and in violation of the trust and confidence placed in him by the bank, negotiate the bill or sell the goods to an innocent purchaser for value, and abscond with the proceeds. In such a case, under Secs. 114, 119, 224, Pers. Prop. Law and Sec. 131, Gen'l Bus. Law, the bank can recover neither the bill of lading nor the goods from the innocent purchaser for value.

In order to protect themselves from this possibility of loss, and still adhere to the practice of entrusting documents of title to buyers for the purposes stated, it has become a common practice for banks, before entrusting the bill of lading to the buyer, to stamp or write upon its face a plain statement of the purpose for which it is entrusted (called a trust receipt notice), as was done on the bills of lading in the suit in *Farmers' & Mechanics' Bank vs. Logan*, 74 N. Y. 568. Any purchaser of the document will then have constructive notice of the banker's rights. But if the person to whom the document is so entrusted obtains possession of the goods and sells or pledges them, instead of the document of title, to an innocent purchaser or pledgee for value, a more difficult question arises. The mere fact that the bank has entrusted the buyer with possession of the goods will not estop the bank from asserting its legal title as against the innocent purchaser or pledgee, for the latter had no right to rely on mere possession as an indicia of ownership. *Farmers' & Mechanics' Bank vs. Logan*, supra, and Sec. 152 infra. Nor will the maxim that where one of two innocent persons must suffer for the wrong of another, he should suffer whose act or omission to act made the perpetration of the wrong possible, because that maxim applies only where the wrongdoer has been given the indicia of ownership or apparent authority (see Sec. 157 infra). Nor will the Factors Act (Sec. 43, Pers. Prop. Law) protect the innocent purchaser or pledgee for in the situation under discussion the bank has not entrusted the buyer with the document of title or the goods for purpose of sale or pledge. It would seem that in New York the bank will be protected even as against an innocent purchaser or pledgee for value of the goods. *Moors vs. Kidder*, 106 N. Y. 32. In that case a bank, as security for an advance of money to the seller upon a shipment of goods, had been named as consignee in the bill of lading. Upon the arrival of the goods, the bank entrusted

the bill of lading under a trust receipt to the buyer for the purpose of entering the goods at the custom house for the account of the bank. Instead of doing so, however, the buyer entered them for his own account, obtained the goods, stored them in a warehouse, and pledged the warehouse receipt to an innocent pledgee for an advance. It was held that the bank was entitled to judgment as against the pledgee.

The bank holding a trust receipt is preferred to the general creditors of the ultimate buyer, who has been entrusted with the document or goods. In *re Bettman-Johnson Co.*, 250 Fed. 657.

§ 144. **Warranties on Negotiation or Transfer of Documents of Title.** "A person who for value negotiates or transfers a document of title by indorsement or delivery, including one who assigns for value a claim secured by a document of title unless a contrary intention appears, warrants: (a) that the document is genuine; (b) that he has a legal right to negotiate or transfer it; (c) that he has knowledge of no fact which would impair the validity or worth of the document; and (d) that he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a document of title the goods represented thereby." Sec. 117, Pers. Prop. Law. Similar provisions as to bills of lading and warehouse receipts are found in Sec. 221, Pers. Prop. Law; Sec. 34, Pomerene Act, and in Sec. 128, Gen. Bus. Law.

"The indorsement of a document of title shall not make the indorser liable for any failure on the part of the bailee who issued the document or previous indorsers thereof to fulfill their respective obligations." Sec. 118, Pers. Prop. Law. Similar provisions with respect to bills of lading and warehouse receipts are found in Sec. 222, Pers. Prop. Law; Sec. 35, Pomerene Act, and in Sec. 129, Gen. Bus. Law.

A banker or other person who has discounted a bill of exchange with a bill of lading attached is not liable to the drawee who pays the draft for any breach by the original seller of the goods (the drawer of the bill of exchange) of a warranty or contract in regard to them. *American Nat. Bank vs. Warren*, 96 Misc. 265. The bank which collects from the drawee of the draft is not selling the draft or the bill of lading attached thereto to the drawee, nor is the bank

making any representations in regard to the bill of lading or the goods behind it. The transaction does not import an agreement by the bank to assume all liabilities of the shipper upon his contract with the drawee. Therefore, even though the bill of lading be a forgery and without any validity whatever, a bank or other holder receiving payment from the drawee in due course is not liable to repay the money received. *Goetz vs. Bank of Kansas City*, 119 U. S. 551; *Williston on Sales*, Sec. 435; *Jacobs vs. Banque Pour Le Commerce et L'Industries*, 131 Misc. 162.

§ 145. **Forged and Altered Documents.** It is obvious that a forged document cannot transfer title to goods, for such a document represents no goods. Nor can it impose any liability upon the bailee who apparently issued it. *Williston on Sales*, Sec. 443.

Closely analogous to forged documents are altered documents. It is as evident as in the case of forged documents that an altered document cannot bind any one by its terms, except the person making the alteration, and persons who, by reason of estoppel or of apparent authority to make the alteration, are precluded from denying its validity. The bailee would be excused from contractual liability upon the document. Whatever the effect of alteration upon the contract, it can have no effect on the title to the goods. *Williston on Sales*, Sec. 443. It is provided in Sec. 202, Pers. Prop. Law, that "any alteration, addition or erasure in a bill after its issue without authority from the carrier issuing the same either in writing or noted on the bill shall be void, whatever be the nature and purpose of the change, and the bill shall be enforceable *according to its original tenor*."

Where an alteration appears to have been made in a warehouse receipt, the warehouseman is liable according to the terms of the receipt, *as altered*, if the alteration was authorized. If it was not authorized, the warehouseman is liable according to the terms of the receipt before it was altered. Material and fraudulent alteration of a receipt shall not excuse the warehouseman who issued it from liability to deliver, according to the terms of the receipt as originally issued; but shall excuse him from any other liability to the person who made the alteration and to any one who took with notice of the alteration. Any purchaser of the receipt for value without notice of the alteration shall acquire the same rights against the warehouseman which such purchaser would have acquired, if the receipts had not been altered at the time of the purchase. Sec. 99, Gen'l Bus. Law.

§ 146. **Effect of Issuing Documents of Title Where no Goods Behind Them.** On theory it would seem that if no goods have been received by the bailee who issued the document of title, the purchaser of the document can acquire no title to any goods unless goods have been later received and **appropriated** to the contract of bailment and the goods can be identified; in which case the consignor or depositor will be estopped to deny against the holder of the document that the goods are the property of the latter. Williston on Sales, Sec. 417.

Where no goods are subsequently received by the bailee, the holder of the document may nevertheless recover damages from the bailee issuing the document, either on the ground that the document amounts to a contract by the issuer to deliver goods therein described, or that it amounts to a representation that such goods were received, on which the holder justifiably relied in purchasing the document. Williston on Sales, Sec. 418.

In New York, it is held as against a bona fide indorsee of a bill of lading, or a consignee who in good faith has advanced money thereon, that the carrier is estopped from denying that the goods, mentioned therein, were received by his agent. *Bank of Batavia vs. N. Y. L. E. & W. R. Co.*, 106 N. Y. 195. The same rule now prevails in the case of interstate shipments by virtue of Sec. 22, Pomerene Act, which provides that where a bill of lading has been issued by a carrier, or on his behalf by an agent or employee, the scope of whose actual or apparent authority includes the receiving of goods and issuing of bills of lading therefor for transportation in interstate and foreign commerce, the carrier shall be liable to the owner of goods covered by a straight bill of lading, or to the holder of an order bill, who has given value in good faith relying upon the description therein of the goods.

Bills of lading, when issued, do not pass title to the goods, if the goods are not aboard the vessel, nor even manufactured. *Armour vs. M. C. R. R. Co.*, 65 N. Y. 111; *Bank of Batavia vs. N. Y. L. E. & W. R. R. Co.*, 106 N. Y. 195; *Baldwin vs. Childs*, 249 N. Y. 212.

It is a violation of U. S. Code, title 49, sec. 121; Penal Law, Sec. 360; and Pers. Prop. Law, Sec. 230, for a carrier to issue bills of lading representing goods not aboard nor even in existence. *Baldwin vs. Childs*, 249 N. Y. 212.

§ 147. **Lack of Title in the Depositor of the Goods.** A

bailor having no title to goods cannot by depositing them with the warehouseman or carrier and receiving a document of title in return, whatever its form, give a good title to a purchaser of the document, however innocent the purchaser may be. *Ogle vs. Atkinson*, 5 Taunt. 759; *Commercial Bank vs. Hurt*, 99 Ala. 130; *Saltus vs. Everett*, 20 Wend. 267; *Brower vs. Peabody*, 13 N. Y. 121; *Dows vs. Kidder*, 84 N. Y. 121; *Moors vs. Kidder*, 106 N. Y. 32. But if the depositor of the goods, though he had no title, had nevertheless the indicia of apparent ownership, and hence ability or capacity to transfer a title to an innocent purchaser for value, a bona fide purchaser of the document of title should be protected in the same way as a bona fide purchaser of the goods would be protected in the same situation. *Moors vs. Kidder*, 106 N. Y. 32.

The carrier or warehouseman issuing the document does not by so doing warrant the title of the depositor; the only assertion in the document is that the goods have been received from the bailor, not that he is the owner of them.

§ 148. **Destruction of Goods Prior to Negotiation of Document of Title.** If the goods are destroyed after their receipt by the warehouseman or carrier, but before the transfer of the document of title, it is apparent that the transferee of the document can acquire no title to the goods. But if he had paid in part or in whole for the promise to transfer the document of title, he may recover any money so paid.

§ 149. **Negotiation of Document of Title Transfers Bailee's Contractual Obligation.** At common law contracts for the carriage of goods, like other choses in action, were not assignable. Therefore, the indorsee of a bill of lading acquired no direct contractual rights against the carrier; nor had the indorsee of a warehouse receipt any better standing. Of course, the indorsee as owner of the goods could sue the bailee in tort for any wilful or negligent injury to or loss of the goods; but "it is sometimes desirable for the owner of goods to sue not by virtue of such ownership but upon the special contract which the bailee made with the bailor." *Williston on Sales*, Sec. 426. Possibly the indorsee might sue on the contract in the capacity of the beneficiary for whose benefit the contract of bailment was made. But as some states did not recognize his right thus to sue as beneficiary, the Uniform Sales Act (Sec. 33) and New York Pers. Prop. Law (Sec. 114, Subd. b) provide that "a person

to whom a negotiable document of title has been duly negotiated acquires thereby (b) the direct obligation of the bailee issuing the document to hold possession of the goods for him according to the terms of the document as fully as if such bailee had contracted directly with him."

§ 150. Creditors' Rights Against Goods for Which a Negotiable Document Is Outstanding. While the goods are in transit and an order bill of lading outstanding, an attachment of the goods cannot be made, because if it were allowed, no one would ever be safe in purchasing or lending money on an order bill of lading, and it is the policy of the law as well as of business that an order bill of lading should be a safe thing to buy or lend money on. Therefore, Sec. 120, Pers. Prop. Law provides: "If goods are delivered to a bailee by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner and a negotiable document of title is issued for them they cannot thereafter, while in the possession of such bailee, be attached by garnishment or otherwise or be levied upon under an execution unless the document be first surrendered to the bailee or its negotiation enjoined. The bailee shall in no case be compelled to deliver up the actual possession of the goods until the document is surrendered to him or impounded by the Court." Similar provisions are found in Sec. 210, Pers. Prop. Law, with reference to intrastate bills of lading; Sec. 22, Pomerene Act, with reference to interstate and foreign bills of lading; and in Sec. 110, Gen'l Bus. Law, with reference to warehouse receipts.

An attaching creditor of the seller should attach the order bill of lading instead of the goods. But if the bill were a straight bill naming the buyer as consignee, the title to the goods is in the buyer, and an attachment of the bill of lading by the seller's creditors would accomplish nothing, because a straight bill is not a symbol of the goods.

The transfer of a non-negotiable document does not prevent the bailor's creditors from seizing the goods for the reason that where there is merely a transfer of a non-negotiable document of title, the document does not control the possession of the goods, and is not, therefore, a symbol of them. Accordingly, there is no delivery, and where delivery is necessary for the transfer of a title good against subsequent purchasers or creditors of the seller, the rights of the transferee are inferior to those of the attaching creditor or the subsequent purchaser.

If the document is negotiable in form, however, it is clear that an indorsee of the document, whether a purchaser or merely a security holder, in effect, acquires title and delivery of the goods by delivery of the document, and will prevail over a subsequent attachment or levy by creditors of the indorser. *Leinkauf Co. vs. Grell*, 62 App. Div. 275.

The buyer's creditors cannot successfully attach goods covered by a negotiable bill of lading even though the buyer is named as consignee therein, provided that the bill of lading has not been delivered to the buyer but has been retained as security by the shipper.

Nor can the buyer's creditors attach, though the shipment was straight, if it was agreed between the parties that title shall not pass to the consignee.

CHAPTER XIII.

EFFECT OF SALE BY PERSON NOT THE OWNER OR BY ONE WHO HAS VOIDABLE TITLE.

§ 151. **In General.** As a general rule where goods are sold by a person who is not their owner nor had authority from the owner to sell them, the buyer acquires no better title than the seller had, unless the owner is estopped from his conduct to deny that the seller had title or authority to sell. Sec. 104, Pers. Prop. Law. This rule is based upon the fundamental doctrine of the law of property that no one can give what he has not. One who has no title at all and no authority express or apparent to sell, can transfer no title and that a buyer from him pays value in good faith without notice makes no difference. *Saltus vs. Everett*, 20 Wend. 267; *Brower vs. Peabody*, 13 N. Y. 121; *Soltau vs. Gerdau*, 119 N. Y. 380; *Phelps vs. McQuade*, 158 App. Div. 258; *A. F. T. Corp. vs. Pathe Exchange*, 105 Misc. 39.

But one who has a title, which in his hands is voidable or subject to a right of rescission by another, may transfer a title to a purchaser for value without notice, free from the possibility of avoidance or rescission. Sec. 105, Pers. Prop. Law.

§ 152. **Owner May Be Estopped to Deny Seller Had Title or Authority to Sell.** The owner of goods may have entrusted them to another under such circumstances as to create in that other either an apparent ownership or an apparent authority to sell the goods, and if a purchaser without notice is led by such apparent ownership or apparent authority to part with value for the goods, the owner by such conduct will be precluded from denying that the seller had title or authority to sell, and the buyer will acquire a valid title, although the seller had neither title nor authority to transfer title.

But it is well settled that the act of the owner in merely entrusting possession of the goods to the seller of them will not raise an estoppel against the owner in favor of a third person who buys them from the seller for value and without notice. It is true that if the owner entrusts possession of

the goods to another, an innocent third person may be led to believe that the possessor is the owner. But every day owners are entrusting possession of their property to others to be repaired or stored, or transported, or for hire or lending or for any number of purposes and if the law were to protect a purchaser from such possessor or bailee at the expense of the owner it would considerably hamper and impede commercial dealings. To a certain extent deception in the ownership of goods has to be permitted for the convenience of business and trade. Therefore, courts have taken the view that a third person purchaser from the possessor of such goods has no right to rely on mere possession as an indicia of ownership or as an authority to sell. *Farmers' and Mechanics' Nat'l Bank vs. Logan*, 74 N. Y. 568.

In *McNeil vs. Tenth Bank*, 46 N. Y. 325, the Court said—"Simply entrusting the possession of a chattel to another as depository, pledgee, or other bailee, or even under a conditional executory contract of sale, is clearly insufficient to preclude the real owner from reclaiming his property, in case of an unauthorized disposition of it by the person so entrusted. 'The mere possession of chattels, by whatever means acquired, if there be no other evidence of property or authority to sell from the true owner, will not enable the possessor to give a good title.'"

"So far as such a parting with possession is necessary in the business of life, or authorized by the custom of trade, the owner of the goods will not be affected by a sale by the one having the custody and manual possession." *Barnard vs. Campbell*, 55 N. Y. 456.

The innocent buyer is protected if the entrusting was for certain purposes, but is not protected if the entrusting was for other purposes. The owner may entrust his goods to another to be repaired or he may lend them to another for the latter's use or he may lease them for hire, and still reclaim them from one who has innocently given value for them to the bailee.

If the owner of the goods entrusts their possession to one who is in the habit of selling such goods, but entrusts them into his possession only for the purpose of repairing or storing them, he may still reclaim them from an innocent purchaser for value to whom they were wrongfully sold by the possessor. *Wilkinson vs. King*, 2 Camp. 335. For example, if the owner of a watch sends it for repair to a jeweler who habitually sells watches, such an entrusting will not without more, prevent the owner from asserting his title

against an innocent purchaser for value of the watch from the jeweler. Williston on Sales, Sec. 314.

Where the owner has not only entrusted possession to one who is in the habit of selling such goods, but has given him authority to exhibit the goods to possible purchasers and obtain offers from them, even in such a case the owner may reclaim the goods from an innocent purchaser for value to whom the possessor wrongfully sold them. *Smith vs. Clews*, 105 N. Y. 283; 114 N. Y. 190. In that case the plaintiffs who were diamond merchants delivered to a diamond broker a pair of diamond earknobs "on approval" to show his customers, and to be returned on demand. The broker sold the diamonds to the defendant. It was held that the plaintiffs might recover the diamonds from the defendant who was a purchaser for value without notice, because the broker had no authority to sell and the defendant was bound by such limitation as the owner had placed upon the broker's possession.

But if the owner, in addition to entrusting the possession of the property to another, either makes or allows to be made written or oral statements inconsistent with any other supposition than that the possessor is the owner, the doctrine of estoppel will bar the owner from recovering the property from a bona fide purchaser of the property. For example, where a hemp merchant allows a broker who had purchased hemp for him to transfer the hemp on the books of the warehouse, where it was stored, to the broker's name, it was held that a purchaser from the broker obtained valid title. *Pickering vs. Busk*, 15 East. 38.

In *Armstrong vs. Boomansour*, 228 N. Y. S. 722, it was held that one who had bought an automobile and allowed his seller to have possession and retain the certificate of registration, which is the indicia of title on which a buyer will naturally rely when dealing with one who offers a registered car for sale, is estopped from asserting title against one who purchased the car in good faith, relying on both possession and registration in the seller.

In the following cases, it was held that the owner was estopped from setting up his ownership as against a bona fide holder: *Parker vs. Baxter*, 86 N. Y. 586 (ship's receipts placed in another's hands); *Dows vs. Kidder*, 84 N. Y. 121 (owner entrusted another with documents of title); *Voorhis vs. Olmstead*, 66 N. Y. 113 (owner entrusted another with possession of warehouse receipt); *Island Trading Co. vs. Berg*, 239 N. Y. 229 (where owner shipped goods to fraud-

ulent seller and allowed him to take the postal receipts for same).

§ 153. **Effect of Unauthorized Sale by Factor Who Has Been Entrusted with Possession of the Goods for the Purpose of Sale.** It sometimes happens that the owner of goods has given them into the possession of a factor or agent for the purpose of selling them on certain particular terms or to a certain particular person and the factor in violation of instructions sells them on different terms or to a different person who pays value therefor without notice. At common law a bona fide purchaser from the factor or agent under these circumstances was not entitled to the goods as against their true owner. Where the possession of goods was entrusted to a factor or broker, who usually sold such goods, with a secret authority to sell to a particular person, an attempted sale by the factor or broker to another person would pass no title.

This worked a hardship on innocent purchasers for value and impeded the ready sale of goods, and as principals had it in their power to employ honest agents, statutes were enacted in England known as Factor's Acts (4 George IV, cap. 83; 6 George IV, cap. 94; 5 and 6 Victoria, cap. 39; 40 and 41 Victoria, cap. 39; 52 and 53 Victoria, cap. 45), which made possession of the goods in a factor or broker under certain circumstances, conclusive evidence of ownership to the extent necessary to protect a purchaser or a lender who acted in good faith and without notice. The Legislature of New York enacted a Factor's Act (now found in Sec. 43, Pers. Prop. Law) in 1830, amended by Laws of 1915, ch. 273, which provides in substance that every factor or agent entrusted with the possession of any bill of lading or other document of title or of the goods *for the purpose of sale or as security for obtaining advances for the principal*, shall be treated as the true owner so as to protect third persons purchasing the goods from such factor or agent or advancing money to him on the faith of his being the true owner, but that any person accepting the goods or any account receivable or other chose-in-action resulting from a sale of such goods from such factor or agent as security for an antecedent debt shall get no greater right to the goods than the factor or agent had.

It should be noted that Sec. 43, Pers. Prop. Law, does not protect innocent purchasers or pledgees from a factor or agent in all cases but only in the following:

(1) Where the document of title or the goods were entrusted with the factor or agent *for the purpose of sale or pledge*. If the factor or agent were entrusted with possession only for the purpose of storage or for display or for delivery to a particular customer, innocent third persons purchasing or lending money on the goods will not be protected. *Smith vs. Clews*, 114 N. Y. 190. A mere bailee of goods without authority to sell or pledge does not come within the scope of the Factor's Act, even though he may have apparent authority to sell. *Schwab vs. Oatman*, 129 App. Div. 274, rev'd on other grounds in 198 N. Y. 545. He must have express authority to sell or pledge or the innocent third person purchaser will not be protected. The doctrine of apparent authority does not apply to a case under the Factor's Act—there must be authority in fact. *Smith vs. Clews*, 114 N. Y. 190. The Factor's Act was intended to take the cases included within its scope out of the doctrine of estoppel. But if the factor or agent was entrusted with the goods for sale or pledge to *one* person and wrongfully sells them to *another* person, the owner cannot recover the goods from the person to whom they were sold for value and without notice, unless he tenders the amount that person paid for them. Subd. 3, Sec. 43, Pers. Prop. Law.

(2) The Factor's Act applies only where the third person purchaser or pledgee *had no notice that the factor or agent was not the owner of the goods*. The Factor's Act will not protect third person purchasers or pledgees where they had notice that the factor or agent was not the owner. *Canales vs. Earl*, 168 N. Y. S. 726.

(3) The Factor's Act applies only where the factor was *entrusted* with the goods by the owner. So, if the factor stole the goods from the owner or procured them from him through fraud, duress, accident, mistake, or conversion, the Factor's Act would not apply to protect innocent third person purchasers or pledgees for value from the factor or agent. *Schmidt vs. Simpson*, 204 N. Y. 434; *Kinsey vs. Leggett*, 71 N. Y. 387; *Soltau vs. Gerdau*, 119 N. Y. 380; *Wood vs. Simpson*, 149 App. Div. 471; *Contra—Thompson vs. Goldstone*, 171 App. Div. 666. The possession of the merchandise contemplated by the statute as essential to the power of a factor to pledge the same, is actual and not constructive possession. *Howland vs. Woodruff*, 60 N. Y. 73. Accordingly, the Factor's Act does not apply where funds were advanced to a factor who did not have possession of the goods and who had only a telegram or manifest de-

scribing the goods. *De Beixedon vs. Brown & Seccomb*, 188 N. Y. S. 451.

§ 154. **Effect of Sale by Seller in whose possession the Buyer Has Left the Goods.** As between the parties, no delivery is necessary to transfer title but as against third persons that rule must be much qualified. Title passes to the buyer as between the seller and the buyer, yet the buyer's title may not be good as against a third person who later acquires the goods from the seller in whose possession they were left.

It was the rule at common law that retention of possession by the seller was not conclusively fraudulent against the seller's creditors or subsequent purchasers but at most only evidence tending to show fraud which may be rebutted by the buyer and if successfully rebutted, the buyer may recover the goods from the seller's creditors or subsequent purchasers. And prior to the adoption of the Sales Act in 1911, it used to be the law in New York that every sale, unless immediately followed by delivery and change of possession, was presumed to be fraudulent as against third persons but this presumption was not conclusive as it could be rebutted by proof that the sale was made in good faith and without intention to defraud third persons. *Sturtevant vs. Ballard*, 9 Johns. 337, 339; *Wickham vs. Miller*, 12 Johns. 320, 323; *Butts vs. Swartwood*, 2 Cow. 431; *Bissell vs. Hopkins*, 3 Cow. 166, 188; *Jennings vs. Carter*, 2 Wend. 446; *Archer vs. Hubbell*, 4 Wend. 514; Laws of 1830; old Sec. 36, Pers. Prop. Law. But with the passage of the Sales Act in 1911, the statutory law on this subject was changed, at least as regards the effect of a sale by a seller in retention of possession as against subsequent purchasers from the seller.

The Sales Act contains two sections in reference to the effect of a sale by a seller in retention of possession of the goods, Sec. 106 relating to the rights of subsequent purchasers of the goods from the seller as against the original buyer, and Sec. 107 relating to the rights of the seller's creditors against sold goods left in the seller's possession. Sec. 106 provides in substance that if the seller of sold goods or documents of title left in his possession sells or pledges them to an innocent purchaser for value, such sale or pledge will have the same effect as if the seller were expressly authorized by the owner of the goods to make the sale or pledge. Instead of a *prima facie* presumption that the first sale without delivery or change of possession is void as

against the second buyer, Sec. 106 now substitutes a conclusive presumption. The true owner is now conclusively estopped to deny that the seller in possession was not his agent to sell to the second buyer.

But as to the rights of the seller's creditors against sold goods left in the seller's possession, Section 107 provides that where such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void. This section does not state that as against creditors of the seller the retention of possession is conclusively fraudulent. It is only where the creditors can show fraud in fact or in law that they can hold the goods as against the buyer. In other words, it leaves the common law rule as to retention of possession in force as against the seller's creditors. *Kimball vs. Cash*, 107 Misc. 363; *Holley vs. A. W. Haile Motor Co.*, 188 App. Div. 798.

We have, then, two rules as to the effect of the seller's retention of possession of sold goods—(1) it is conclusively fraudulent as to subsequent purchasers of the goods from the seller and the buyer will not be allowed to explain the retention of possession under any circumstances and subsequent purchasers for value and without notice will have a better title to the goods than the first buyer; (2) it is only presumptively fraudulent as to the seller's creditors and if the buyer can explain the retention of possession consistently with good faith on his part, he will overcome the presumption of fraud and will be allowed to have the goods free from the claims of the seller's creditors.

As a result of the enactment of the Sales Act with the resulting repeal of the prior statute, it is only as against the seller's creditors that the buyer can explain and justify the retention of possession; as against subsequent purchasers for value without notice once the fact of retention of possession is established, the buyer's right to the goods is gone.

§ 155. **What Constitutes Retention of Possession by the Seller.** Will a symbolic delivery or constructive change of possession take the case out of the statute? It has been held that delivery of samples where the bulk of the goods was large and not easily moved and the buyer having no convenient place for them, left them with the seller on storage for which he paid, might be sufficient delivery of the goods to pass title good as against the seller's creditors. *Ingalls vs. Herrick*, 108 Mass. 351. In a sale of bulky and cumbersome goods, such as machinery, although there need



be no change in their location, some act, definite and distinct, is always required to indicate the change of possession and title. Stimson vs. Wrigley, 86 N. Y. 332. If the seller is left in control of the goods or property as agent for the buyer or as co-owner with the buyer (as where all or part of a business or its stock and fixtures are sold but left by the buyer where they were and the seller is retained in control of them as agent or superintendent or partner of the buyer), there is no retention of possession within the meaning of the statute if the change in ownership is open and notorious. McKibbin vs. Martin, 64 Pa. 352; Menken vs. Baker, 40 App. Div. 609, aff'd without opinion in 166 N. Y. 628; Fisher vs. Stout, 74 App. Div. 97. See Butler vs. Stoddard, 7 Paige 163. In order to take the case out of the statute, not only must possession be taken by the buyer, but that possession must be exclusive of the seller. A concurrent possession will not do. Spotten vs. Keeler, 22 Abb. N. C. 105. But the fact that the buyer leaves the goods in the seller's place and by the sale the place becomes the buyer's place and the seller is employed by the buyer in that place as an agent or employee in a capacity which holds out no sign of ownership does not constitute concurrent possession. Where a wife openly and notoriously purchases her husband's property at a public auction and leaves it in the family home, there is not a retention of possession within the statute. In Stanley vs. The National Union Bank, 115 N. Y. 122, 136, the Court said: "The law does not require a family to be broken up or a wife to separate from her husband to enable her to acquire and maintain possession of property lawfully owned by her."

Retention of possession does not necessarily mean continuous possession by the seller. If the goods are at any subsequent time returned by the buyer into the possession of the seller, the presumption of fraud will arise. Tilson vs. Terwilliger, 56 N. Y. 273.

Even though the goods be sold at a public execution sale, there is the same presumption as to fraud if the goods are left in the possession of the seller. Fonda vs. Gross, 15 Wend. 628, 630; Stimson vs. Wrigley, 86 N. Y. 332, 337. And it makes no difference that the execution creditor, after delaying, took possession before other creditors attached. Gardenier vs. Tubbs, 21 Wend. 169.

As far as the rights of the seller's creditors are concerned, if there was a clear case of retention of possession, the buyer may explain it as consistent with good faith and

*When seller buys return mechanical goods for repairs.
e 1891 does not apply.*

if he succeeds in doing so will be entitled to the goods. If the goods sold are in the process of manufacture by the seller, and are left with him for completion, the presumption of fraud is as a matter of law rebutted. *Prentiss Tool and Supply Co. vs. Schirmer*, 136 N. Y. 305. Likewise, where sold goods are left in the seller's possession for alteration, the presumption of fraud is rebutted. But if the sold goods are left temporarily in the possession of the seller merely for the accommodation or convenience of the buyer, the presumption is not rebutted. *Gardner vs. Adams*, 12 Wend. 297, 298; but see *Clute vs. Fitch*, 25 Barb. 428, 432.

§ 156. **Effect of Sale by One Who Has Obtained the Goods from the Owner by Fraudulently Impersonating Another, or by Other Fraudulent Means.** Owners of goods have sometimes been induced to part with them under a supposed sale to a person of credit, when in reality such a person has been impersonated by one to whom they have delivered the goods. Of course, the owners may recover the goods from the imposter. But if the imposter has in the meantime sold the goods to an innocent purchaser for value, may the owners reclaim the goods? *yes*

The leading case on this subject is *Cundy vs. Lindsay*, H. L. 1872, L. R. 3 App. Cas. 459. In that case, one Alfred Blenkarn hired a room which had side windows on Wood Street. He wrote an order to Messrs. Lindsay as from "37 Wood Street." He signed this letter without any initial representing a Christian name, and wrote it so that it appeared to be "Blenkiron & Co." There was a firm, in good credit, of W. Blenkiron & Son, carrying on business at 123 Wood Street. The goods were sent addressed to "Messrs. Blenkiron & Co., 37 Wood Street," where they were obtained by Blenkarn. He sold some of the goods to Messrs. Cundy for value, and without notice, and they resold them in the regular course of business. Messrs. Lindsay brought action against Messrs. Cundy for conversion and were held entitled to maintain that action, as title had not passed from them to Blenkarn.

On the other hand, in *Phelps vs. McQuade*, 220 N. Y. 232, Phelps sold and delivered some jewelry to one Walter J. Gwynne, who in a personal conversation represented himself to be one Baldwin J. Gwynne, a man of good credit. Walter J. Gwynne subsequently sold the jewelry to McQuade and it was held that Phelps could not recover the jewelry from McQuade as a voidable title had passed from Phelps to Gwynne, which had become an indefeasible title on sale

to McQuade. Because of the fraud he practised on Phelps, Gwynne's title was only a voidable one. It could have been avoided by Phelps at any time before Gwynne sold the goods to an innocent purchaser for value. Thereafter it could not. As Walter J. Gwynne stood before him, Phelps had a double intention. He intended to sell to the man standing before him. He also intended to sell to Baldwin J. Gwynne, but as he supposed the man standing before him (Walter J. Gwynne) to be that person, *he intended to sell to him* (i. e. Walter J. Gwynne). Whether title passes or not is a matter of intention. If the seller intends title to pass at the time of the bargain, it will, even though the price has not been paid. Here, although it is true that the seller intended to transfer the title to the person of good credit, whom he supposes the imposter standing before him to be, his primary intent is to transfer title to the person before him, and accordingly title will pass. Where the parties are dealing face to face, the vendor intends to deal with the person present and identified by sight and hearing and therefore, the minds of the parties meet, resulting in a contract and transfer of title to the property. A sale to an imposter dealing face to face with the vendor, although voidable for fraud as between the parties, nevertheless enables the imposter to pass a good title to an innocent purchaser for value.

But where goods are ordered through the mail by an imposter, as they were in *Cundy vs. Lindsay*, supra, the name of a responsible buyer being used as a fraudulent means of inducing the seller to send forward the goods, the seller's primary intent is to sell the goods to the person whose name appears to be signed to the letter,—that is the essential matter in the seller's mind, and the intent to sell the goods to the person who wrote the letter is only secondary. Where, therefore, the imposter is carrying on his impersonation of another by correspondence, and not face to face, the agreement is void for want of consent, and there is no meeting of minds, and no title or right to the goods can be acquired from the imposter by an innocent purchaser for value. *Mercantile Nat. Bank vs. Silverman*, 148 App. Div. 1, aff'd 210 N. Y. 567.

In *Amols vs. Bernstein*, 214 App. Div. 469, the plaintiff was a jeweler. A stranger came to his store and examined a diamond ring then on display, marked \$900. The stranger represented himself to be a man by the name of Gorey. He said he would purchase the ring if the plaintiff would take in exchange a ring, which he produced and claimed to have

purchased in Buffalo for \$550. The plaintiff said he would take the ring and allow him \$400 for it towards the purchase of the \$900 ring. The stranger stated that he would have to give a check for the other \$500, and in order to induce the plaintiff to accept his check, he took from his pocket a card bearing the name of Gorey Automobile Co., Bedford Avenue, New York, and suggested that the plaintiff ring up the bank to ascertain if the check would be good. The plaintiff rang up the bank and was informed that the Gorey Automobile Co. was good for much more than \$500. The plaintiff then parted with the \$900 ring in exchange for the stranger's ring and the check for \$500, signed by Gorey Automobile Co., James C. Gorey, president, whom the stranger represented himself to be. When the check was presented at the bank, it was found to be a forgery. The ring which the stranger had given in exchange he had obtained from another person also by giving a forged check. Two days later the stranger pledged the \$900 ring with defendant, a pawnbroker, for a loan of \$450, which was never repaid. The plaintiff brought an action to recover the ring from the defendant in the Municipal Court, which held that he could recover the ring as the stranger had obtained it from him by fraud. The defendant appealed to the Appellate Term of the Supreme Court, which reversed the judgment and dismissed the complaint on the authority of *Phelps vs. McQuade*, *supra*;—that is, that the parties were dealing face to face and therefore the plaintiff intended title to pass to the stranger, who got thereby a voidable title and his transfer of the ring to an innocent pledgee for value cut off the plaintiff's right to recover the ring. An appeal was taken to the Appellate Division, which reversed the judgment of the Appellate Term, thus holding that the plaintiff, the jeweler, could recover the ring from the defendant, the pawnbroker. The Appellate Division thought that the stranger did not get a voidable title—he did not get the ring by fraudulent impersonation but by common law larceny and common law forgery; the ring was in effect stolen from the plaintiff, so that the stranger got no title at all which he could pass on to the pawnbroker.

It would, therefore, seem that if the fraudulent means used by the imposter in obtaining delivery of the goods comes within the definition of a common law or statutory crime, it would make no difference whether the impersonation was carried on through the mails or face to face; in either case the owner may recover the property from an innocent purchaser for value. In *People vs. Miller*, 169 N. Y.

339, the Court of Appeals (at p. 350) thus defined common law larceny: "The offense of larceny at common law is established by proof on the part of the prosecution showing that the defendant obtained possession of the property by some trick, fraudulent device or artifice, *animo furandi*, with the intention at the time of subsequently appropriating it to his own use." This definition is so broad that it would seem to include within its scope almost every case of fraudulently obtaining goods through impersonation or otherwise. If that is so, the decision in *Amols vs. Bernstein*, *supra*, would appear to remove the distinction hitherto made between impersonation by mail and impersonation in personal presence, as far as allowing the owner to recover the goods from an innocent purchaser for value.

Where an owner of goods delivers them on credit to another, who claims to be acting for an undisclosed principle, if that not be the fact, the owner may recover the goods from a warehouseman to whom they had been delivered, notwithstanding the fraudulent person had pledged the warehouse receipts to a bank for a loan. *Rodliff vs. Dallinger*, 141 Mass. 1. In that case the plaintiff, the owner, intended to pass title only to the unknown principal and as he did not exist, there was no sale and the title did not pass. **It was not a sale** to the would-be agent, voidable because of fraud, but no sale at all, even though the sale was entered on the plaintiff's books as a sale to the would-be agent, as that was done merely because the plaintiff did not know the name of the alleged principal.

§ 157. **Application of the Maxim that Where One of Two Innocent Persons Must Suffer from the Wrong of Another, the Loss Should Fall on Him Who Placed It in the Power of the Wrong Doer to Perpetrate the Fraud.** In some cases where the person to whom the owner of goods has entrusted possession of the goods or document of title to another who fraudulently or without authority disposes of them to an innocent purchaser for value, courts have applied the well-known maxim or equitable rule that where one of two innocent persons must suffer from the wrong of another, the loss should fall on him who placed it in the power of the wrongdoer to perpetrate the fraud, and have not allowed the owner to recover the goods from the innocent purchaser for value.

In *Commercial Bank vs. Armsby*, 120 Ga. 74, *Armsby & Co.* in Michigan contracted to sell goods to various purchasers in Georgia. The goods were shipped from Oregon

by the parties from whom Armsby & Co. had ordered them. These parties in Oregon sent order bills of lading to Armsby & Co., who indorsed them in blank and mailed them to Walton & Carr, their agents in Georgia, who were to distribute the goods to the various purchasers, and who were named as the persons to be notified in the bills of lading. Walton & Carr upon receipt of the bills of lading indorsed in blank pledged them to a bank for a loan and then failed. The bank obtained delivery of the goods from the carrier and sold them to satisfy the pledge. In an action of trover brought by Armsby & Co. against the bank, it was held that the bank was not liable. The bank did no wrong in accepting the bills of lading, indorsed in blank and offered as security by the persons named in the bills of lading to be notified—that was *prima facie* evidence that such persons had paid the draft and were the owners of the goods, especially as Walton & Carr to the knowledge of the bank had often bought and sold goods on their own account. The Court pointed out that Armsby & Co. had, by failing to attach a draft to the “order notify” bill of lading, as was the custom, placed it in the power of Walton & Carr to perpetrate a fraud and applied the rule that where one of two innocent persons must suffer from the wrong of another, the burden should be borne by him who placed it in the power of the wrongdoer to perpetrate the fraud.

In *Penn. R. R. Co. vs. Bank of U. S.*, 214 A. D. 410, the Court applied the rule, as between a carrier who had through mistake issued a straight bill of lading instead of an order notify bill of lading as the contract called for, and the purchaser had sold the goods to an innocent purchaser for value, that where one of two innocent persons must suffer, the one who has rendered the loss possible should bear the loss, and refused to allow the carrier to recover the goods from the innocent purchaser for value.

In *White vs. Garden*, 10 C. B. 919, one Parker purchased iron from the defendants for which he gave them a bill of exchange accepted by a fictitious person. He then gave them an order to deliver the iron to the plaintiff, a bona fide purchaser for value, to whom he had sold it. The iron was put on a barge and forwarded to the plaintiff's wharf to be unloaded. The plaintiff had unloaded part of the iron when the defendants discovered that the supposed acceptor of the bills was a fictitious person. The defendants, thereupon, removed the barge with the iron remaining on it from the plaintiff's wharf, claiming that because of the

fraud, title to the iron had not passed to the plaintiff. In an action of trover in which the plaintiff claimed that the right in the original sellers to rescind the sale was at an end when the goods had come into the hands of a bona fide purchaser for value, it was held that the plaintiff could recover, as title had passed to the plaintiff. The Court said: "One of two innocent parties must suffer; and surely it is more just that the loss should fall on the defendants, who were guilty of negligence in parting with their goods upon the faith of a piece of paper which a little inquiry would have shown to be worthless, rather than upon the plaintiff, who trusted to the possession of the goods themselves."

The maxim that where one of two innocent persons must suffer from the wrong of another, the loss should fall on him who placed it in the power of the wrongdoer to perpetrate the fraud, is not a rule of universal application. Suppose a thief steals my property because I did not lock the door and sells it to an innocent purchaser for value. The maxim is not applied to such a case, for it is well settled that the owner may recover his goods from a bona fide purchaser where they were stolen, no matter whether the owner by his carelessness made it possible for the thief to perpetrate the fraud on the innocent purchaser for value. Nor does the maxim apply to cases where an imposter sells the goods to an innocent purchaser for value after having obtained them from the owner through a fraudulent impersonation (*the owner never intending title to pass*), and the law does not inquire whether the owner by his negligence or carelessness in not ascertaining whether the imposter was really the person he represented himself to be, made it possible for the wrongdoer to sell the goods to another as if he were the owner. But in *White vs. Garden*, supra, the defendants *intended* title to pass to Parker, the fraudulent person. There was no impersonation in that case. They knew they were dealing with Parker and intended to vest title in him.

In *Saltus vs. Everett*, 20 Wend. 267, under a contract of sale, the goods were shipped on a ship of the buyer's selection. The ship put into a port of distress on the way and the goods were transferred to another ship, the captain of the first ship without authority taking a bill of lading to his own order which was indorsed and the goods delivered to the defendant on arrival. In an action of trover by the buyer it was held that he was not estopped from asserting

his title and could recover. It should be observed that the defendant bought the goods from one who not only had the actual possession of the same, but also the usual evidence of title, i. e. an order bill of lading indorsed to him. Nevertheless, it was held that the true owner cannot be estopped by a bill of lading not given by himself but by some third person without authority or fraudulently. In the *Saltus* case, we have two innocent people, one of whom must suffer loss by the wrong of the ship captain. But the Court refused to apply the maxim we have been speaking of, and applied instead the general rule of law that no man can be divested of his property without his consent and not even an honest purchaser can hold the goods against him. The Court said there were two exceptions to that rule: (1) money or negotiable paper indorsed in blank or to bearer bought in good faith and for value may be retained, even if it were lost or stolen from the true owner, and (2) where the owner has conferred the apparent right of property upon the person from whom the bona fide purchaser buys the goods; in such a case, the bona fide purchaser may keep them as against the owner. The Court said that the *Saltus* case did not fall within one of the two exceptions, and therefore, the innocent purchaser for value, the defendant, was not protected as against the owner, the plaintiff.

On the one hand, we have the general rule of law that no man can be deprived of his property without his consent and that no one can acquire a better title to personal property than his vendor had. On the other hand, we have the maxim or equitable rule that where one of two innocent persons must suffer from the wrong of another, he must suffer who has placed the offender in a position to do the wrong. But the equitable rule does not apply (1) where the owner has entrusted the possession of the goods to another without giving him authority to sell or pledge or any documentary or other evidence of the right to dispose of the goods; (2) where he has sold the goods to an imposter carrying on the impersonation through the mails and the imposter sells them to an innocent purchaser for value, even though the deception might have been discovered before parting with the goods by diligence on the part of the owner.

In *Barnard vs. Campbell*, 55 N. Y. 456, the defendants in New York on August 21st purchased of Jeffries in Boston 1,800 bags of linseed and gave him their notes for the same. Jeffries at the time did not have the linseed or any evidence

of ownership or dominion over it. Subsequently, on the same day, Jeffries contracted to purchase 1,800 bags of linseed from plaintiffs, also doing business in Boston. On August 24th, the plaintiffs, induced by fraudulent representations upon the part of Jeffries, delivered to him an order for 1,370 bags, which were delivered to him and shipped to defendants under a bill of lading by which the linseed was deliverable to them. Jeffries had pledged the defendants' notes as collateral for a loan and on August 27th failed, without having paid the plaintiffs or having repaid the loan. In an action of replevin to recover the possession of the 1,370 bags, the Trial Court instructed the jury that if they found that the plaintiffs waived the payment of the purchase price as a condition precedent to delivery and vesting of title in Jeffries, then their verdict must be for the defendants, under the rule that when one of two innocent persons must suffer loss by reason of the fraud or deceit of another, the loss shall fall upon him by whose act or omission the wrongdoer has been enabled to commit the fraud. On appeal this was held to be error. The Appellate Court thought that maxim did not apply, as it is subordinate to the general rule that in the absence of an estoppel no one can transfer a better title than he himself has and that there was no estoppel in the case, as the plaintiffs had done nothing to induce the defendants to put faith in or give credit to the claim of Jeffries that he had the right to sell the property, the defendants having bought the linseed from Jeffries at a time prior to which the plaintiffs had contracted to sell to Jeffries.

§ 158. Who Is a Purchaser for Value Without Notice.

In many instances in the law of sales, the rights of a bona fide purchaser are involved (see Secs. 65, 67, 69, 101, 105, 106, 114, 143, 192, 193, 200, 201, 203, 208, 218, 225, 226, 228, 229, of the Pers. Prop. Law of N. Y.); and it becomes of great importance to determine who is a purchaser for value without notice. Of course, he must have made a valid binding contract to purchase the goods; must have paid or given value for them; and must have been without notice of any defect in his seller's title or of any facts rendering the transfer wrongful.

A donee is obviously not a purchaser for value without notice. *Baker vs. Lever*, 67 N. Y. 304. It has been held that one who has paid part of the purchase price prior to receiving notice of a defect in his vendor's title is *pro tanto* a buyer for value. *Sargent vs. Eureka Spund Apparatus Co.*,

46 Hun. 19. One surrendering a past due promissory note in return for goods is a taker for value. *Paddon vs. Taylor*, 44 N. Y. 371.

The Uniform Sales Act defines value as "any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, constitutes value where goods or documents of title are taken either in satisfaction thereof, or as security therefor." The New York Legislature omitted this definition from the Sales Act when they adopted it. Consequently, the common law rule still prevails in this state—that the taker of goods in payment of or as security for an antecedent debt is not a purchaser for value. *Weaver vs. Barden*, 49 N. Y. 286; *Stevens vs. Brennan*, 79 N. Y. 254, 258. On principle, this view seems wrong, because the cancellation of a debt is a surrender of something valuable. It has been held that one who takes chattels as collateral security for an antecedent debt is not a purchaser for value. *Button vs. Rathbone*, 126 N. Y. 187. The Negotiable Instruments Law of New York defines value as follows: Sec. 2 "‘value’ means valuable consideration" and in Sec. 51, "‘value’ is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time." In other words, in New York an antecedent debt is "value" as far as consideration for a negotiable instrument is concerned, but not as far as a sale of personal property is concerned. *Williston on Sales*, Sec. 620, points out, "There seems no reason to distinguish what constitutes value where negotiable paper is purchased and where property of other sorts is purchased. The purchaser for value of negotiable paper may get greater rights than the purchaser for value of property of other kinds, but it seems an unnecessary and undesirable complication of the law to maintain a distinction as to what constitutes value. This is especially true so far as chattel property is concerned, since such property is frequently transferred by means of bills of lading and warehouse receipts. In view of the large degree of negotiability given such documents, it would be unfortunate to distinguish them from negotiable paper in respect to the definition of value." It has been held under Sec. 40 of the Pers. Prop. Law that an antecedent indebtedness is value sufficient to validate a transfer of property from husband to wife as against his creditors. *Frank vs. Von Bayer*, 236 N. Y. 473.

An antecedent debt is value within the ruling of the

Federal courts. *Pere Marquette Ry. Co. vs. French & Co.*, 245 U. S. 538, 542, 543.

An attaching creditor is not a purchaser for value without notice, "since an attachment is *in invitum* and gives no greater rights in the attached property than the debtor himself had. It must be observed, however, that where the defect in the title of the property is due to fraud against creditors, this rule does not apply. For the same reason that an attaching creditor is not a purchaser for value, an assignee, or trustee in bankruptcy or under a general assignment for the benefit of creditors is not a purchaser for value, *Paddell vs. Janes*, 84 Misc. 212, nor is a receiver." *Williston on Sales*, Sec. 620.

A purchaser at a mortgage foreclosure sale purchases only such right, title and interest as the mortgagee had in the premises. *Central Union Gas Co. vs. Browning*, 210 N. Y. 10. Therefore, where a real estate mortgage was made prior to a conditional sale of chattels, affixed to realty, and therefore, not on the faith and credit thereof, a purchaser at a mortgage foreclosure of the realty takes subject to the conditional sales agreement. *Horowitz vs. Welt*, 229 N. Y. S. 519. The reservation of title to goods sold under a conditional sale contract and to be affixed to realty is good against the owner of the realty if he were the purchaser and against his mortgagee if he had mortgaged the premises before the goods were sold and affixed, even though the conditional sale contract not be filed, Sec. 67; first sentence, *Pers. Prop. Law*; and if the realty is subsequently sold at a mortgage foreclosure sale, the purchaser at the foreclosure sale takes subject to the conditional vendor's rights against the mortgagee, and he will not be deemed a subsequent purchaser for value without notice within the meaning of the second sentence of Sec. 67. *Craine Silo Co., Inc. vs. Alden State Bank*, 218 App. Div. 263. But if the mortgage was executed after the goods were sold and affixed to the realty, then the conditional vendor's reservation of title is not good as against the subsequent mortgagee (second sentence of Sec. 67), even though the conditional sale contract be filed and the purchaser of the foreclosure sale would be deemed a subsequent purchaser for value without notice. In *Kohler Co., Inc. vs. Brasun*, 222 App. Div. 338, one Jurewicz, in possession of a hotel and the real property connected therewith, as vendee under a land contract, purchased of the plaintiff an electric light plant upon a conditional sale contract with reservation of title in the plaintiff until the same should be fully paid

for. The electric light plant was installed and affixed to the hotel but the conditional sale contract was never filed as required by Sec. 67. Thereafter, Jurewicz defaulted in payments on the land contract, and the vendor in the land contract foreclosed and the premises were sold to the defendant under a judgment on the foreclosure action. Jurewicz, then, defaulted in payments for the electric light plant under the conditional sale contract. The plaintiff, upon the refusal of the defendant to surrender the plant, brought an action to replevy it. The Appellate Division reversed a judgment for the defendant, holding that the defendant being a purchaser upon a foreclosure sale, acquired only such rights in the electric light plant as the vendor in the land contract had, and that as the vendor under the land contract would not have had any right of ownership in the plant as against his vendee, because the vendor's position had not been changed since the plant was affixed to the realty, the defendant was not a purchaser for value without notice. But the Court of Appeals, in a decision rendered on November 20, 1928, 249 N. Y. 224, reversed the judgment of the Appellate Division. It should be observed that the purchaser of the electric light plant under the conditional sale contract was not the owner of the realty, but only a vendee in possession under a land contract. Therefore, the last sentence of Sec. 67 applies and as the conditional sale contract was not filed before the plant was affixed, the reservation of title in the plaintiff was void as against the owner of the realty, the vendor under the land contract, and any one acquiring his rights, such as the defendant who purchased at the foreclosure sale.

Sometimes a purchaser without notice will give his executory promise to pay for goods; e. g. his promissory note, or check, or where the sale to him is on credit only. Does such a purchaser give value? Is such a person a purchaser for value without notice? The following is quoted from Williston on Sales, Sec. 620: "Under a proper construction of the Sales Act, it seems that not only is one who takes goods in payment of or as security for an antecedent debt a purchaser for value, but so also is one who takes goods, giving in return an executory promise if the terms of the promise are such that it is 'consideration sufficient to support a simple contract.' This doctrine is perhaps opposed to general legal understanding, but is not unsupported by authority. (Citing among other cases, *Northrup vs. Coon*, 154 App. Div. 337). Upon principle

there seems no good reason why a purchaser should be deprived of the benefit of his bargain because his obligation to pay is executory. The original owner or claimant of the goods should not have the right to deprive the innocent purchaser of the goods, but should be obliged to get relief from the enforcement for his advantage, of the obligation of the purchaser to pay the price." The Northrup case referred to related to the question of consideration for a deed of real property. The alleged consideration was the promise of the grantee to care for and maintain the grantor until her death. This the grantee did and the consideration thereby became fully executed. But prior to this agreement the grantor, unknown to this grantee, had executed a deed of the same property to the plaintiff and delivered it to the notary's daughter for subsequent delivery to the plaintiff, but the deed was not recorded prior to the time of the giving of the second deed to the defendant. The question arose whether the executory promise of the defendant to support the grantor was a valuable consideration within the meaning of the Recording Act. It was held that an agreement to support one for life actually executed is without doubt a valuable consideration, which will sustain the right of a grantee to a deed taken without notice of an unrecorded deed. But inasmuch as the Court did not concur with the finding of the trial court on the question of the good faith of the defendant in taking the deed, it appearing that the defendant knew that papers had been executed by the grantor to the plaintiff, but never attempted himself to communicate with the plaintiff to ascertain the nature of his claim, it was held that the defendant was not a purchaser in good faith and judgment for the defendant was reversed. This case would hardly seem to be authority for the proposition that an *executory* promise to pay will constitute a buyer a purchaser for value within the meaning of the Recording Acts. It should be observed that Professor Williston's argument above quoted is based on the definition of "value" as given in the Uniform Sales Act, namely, "consideration sufficient to support a simple contract," but inasmuch as the New York Legislature has omitted that definition of "value" in the Pers. Prop. Law, it seems doubtful whether a buyer who has given nothing but an executory promise to pay would be deemed a purchaser "for value" in New York State.

In *Amer. Soda Fountain Co. vs. Najarian*, 195 N. Y. S. 555, the plaintiff sold a soda fountain under a conditional

sale contract, reserving title in himself until payment of the notes given by the conditional buyer for the purchase price. The conditional buyer executed a chattel mortgage on the fountain. This mortgage was foreclosed and the defendant claimed title to the fountain through the purchaser at the foreclosure sale. The plaintiff had failed to refile the contract within 30 days preceding one year from the time of the original filing, as provided for by Sec. 64, Pers. Prop. Law, prior to its repeal by Laws 1922, c. 642 Sec. 2 (present Sec. 71, Pers. Prop. Law). It appeared that the chattel mortgage expressly provided that it was given subject to the lien of the plaintiff; that it was sold subject to the lien and bid in by the mortgagee who sold and transferred all his interest to the defendant. It was held that such interest would only become absolute upon payment of the unpaid purchase price due to the conditional vendor; hence, the defendant was not a purchaser in good faith for value and his title did not become absolute until he had paid the balance of the purchase price due the conditional seller.

Not only must the buyer be a purchaser for value under the provisions of Sec. 65, 67, 69, 101, 105, 106, 114, 143, 192, 193, 200, 201, 203, 209, 218, 225, 226, 228, and 229, Pers. Prop. Law, but he must (1) be a purchaser "without notice." A purchaser *with notice* will secure a good title by obtaining it from a party *who had no notice*, and may hold the property bought against the equities of a party otherwise entitled to be regarded as the true owner. *Williamson vs. Mason*; 12 Hun. 97, 108. (2) be a purchaser "in good faith" Sec. 156, Pers. Prop. Law states that a thing is done "in good faith" when it is in fact done honestly, whether it be done negligently or not. In *Anderson vs. Nicholas*, 28 N. Y. 599, 604, Denio, C. J., said: "The buying of such a species of property from a lad sixteen years old, for one-third of its market value, could not well have been *bonafide*."

CHAPTER XIV.

BULK SALES ACT.

§ 159. **History and Purpose.** Since frauds upon creditors have frequently been committed by a dealer-debtor selling all or substantially all of his merchandise at once and departing with the consideration received without paying his creditors, the legislature in 1904 enacted a statute (L. 1904, ch. 569, p. 1385) which as amended by L. 1907, ch. 122 and L. 1914, ch. 507, is found in Sec. 44, Pers. Prop Law, and is known as the Bulk Sales Act.

§ 160. **Provisions of Bulk Sales Act.** The general import of the Act is that such a sale is void as against the creditors of the seller (1) unless at least five days before the sale a full and detailed inventory showing cost price to seller of each article included in the sale be made by the seller or purchaser; (2) unless the purchaser demand and receive from the seller a written list of names and addresses of the creditors of the seller with the amount of indebtedness owing to each certified by the seller under oath; and (3) unless at least five days before taking possession of such merchandise, or paying therefor, the purchaser notify personally or by registered mail every creditor whose name and address appear on the list, or of which he has knowledge, of the proposed sale and of the price, terms, and conditions thereof.

Any purchaser in bulk of any part or the whole of the stock of merchandise, or merchandise and fixtures of the business of the seller, otherwise than in the ordinary course of trade, who fails to perform any of these formalities, shall upon application of any of the creditors of the seller become a receiver and be held accountable to such creditors for all the goods and fixtures that have come into his possession under the sale.

§ 161. **Transfers to Which the Act Applies.** It should be observed that the Bulk Sales Act applies only to sales in bulk of any part or the whole of the merchandise of the business of the seller, *otherwise than in the ordinary course of trade and in the regular prosecution of said business*. So, a sale in bulk in the ordinary course of trade or in the regu-

lar prosecution of the seller's business does not come within the Act. The sellers and purchasers mentioned in the Act include corporations, associations, co-partnerships, and individuals. But general assignments for the benefit of creditors or sales by executors, administrators, receivers, trustees in bankruptcy, assignees under a voluntary assignment for the benefit of creditors, or sales by any public officer under judicial process are not transfers within the Act. Subd. 2, Sec. 44.

In *Pritz vs. Jones*, 117 App. Div. 643, it was held that a sale by a saloonkeeper of his business and stock of liquors, where he was a lessee of his saloon under a lease for a year with right of renewal from year to year so long as he purchased beer from his landlord, who owned the building and fixtures, was not a sale within the provisions of the Act. In *Stewart vs. Sulger*, 161 N. Y. S. 489, it was held that Sec. 44, Pers. Prop. Law, requiring notice to creditors upon transfer of stock of goods in bulk, does not apply to a transfer by a hotel keeper of furniture and fixtures of a hotel, with a half interest in an automobile. In *Heilman vs. Powelson*, 101 Misc. 230, it was held that the Act did not cover a sale of fixtures only, as the legislature intended that the Act should apply to a sale of stock of merchandise primarily, and also to include in the prohibition, fixtures pertaining to the business, if sold in connection with the merchandise, but not to cover fixtures only. See also *Saqui vs. Wiricks*, 167 N. Y. S. 661. The sale of a publishing business together with the necessary fixtures, machinery, and merchandise and the goodwill has been held to be a sale within the provisions of the Act. *Digregorio vs. Avanti Publishing Co. Inc.*, 129 Misc. 345. The sale of a wood-working company of its business, together with the goods, wares, merchandise, fixtures, and machinery thereof, has also been held to be a sale included within the Act. *Mosson vs. Kriser*, 212 App. Div. 282. And a sale of all the material and articles used in the contracting branch of the seller's business has been held to constitute a sale in "bulk," although the articles were delivered in the original bundles, some several hundred in number. *Mott vs. Reeves*, 125 Misc. 511, aff'd 217 App. Div. 718 mem., aff'd without opinion, 246 N. Y. 567 mem. A sale by a retail hardware merchant, who as a side line engaged in wiring buildings, of wire, conduits, switch boxes, fixtures, etc., to be used in connection with a particular job of wiring, was held to constitute a sale of "merchandise" within the meaning of the Act. *Mott vs. Reeves*,

supra. Where a storekeeper sold the entire contents of the store to his parents, with the understanding that he was going to give up the store and that if they desired they might close it up or run it, the sale was held not to be within the Act where the goods which were in the store were easily identified and subject to the payment of a judgment against the son in favor of the plaintiff, the objecting creditor. *Dunne Co. vs. Du Mond*, 207 App. Div. 538. And it has been held that the sale of a truck load of leather is not within the Act where the seller did not at the time the sale was made have any fixed place of business, or any fixtures or stock of merchandise. *Feldstein vs. Fusco*, 238 N. Y. 58, reversing 205 App. Div. 806. The Act applies only to tangible assets of a business; and does not include the goodwill thereof, and therefore, the receivership cannot extend to the goodwill. *Thorndike, Hix Lobster Co. vs. Hall*, 132 Misc. 723. In *Starr Piano Co. vs. Sammak*, 235 N. Y. 566, the receiver was denied possession of leases, conditional sale contracts, and notes, since the Act refers plainly to tangible personal property only.

§ 162. **Creditors Included Within the Act.** The Act is applicable only to parties who are creditors at the time of the transfer and whose claims are absolute and not contingent at that time. *Apex Leasing Co. vs. Litke*, 173 App. Div. 323, reversing 93 Misc. 353; *Silberstein & Sons vs. Cohen*, 226 N. Y. S. 549. See *Adams-Flanigan Co. vs. Di Donato*, 180 App. Div. 342, aff'd 228; also *Tromer vs. Bader*, 80 Misc. 335. The statute uses the word "creditors" without any qualification and it would therefore seem that the legislature intended to extend the benefit of the Bulk Sales Law to *all* creditors, including simple or general creditors, as distinguished from judgment creditors. This was the unanimous opinion of the Appellate Division of the Supreme Court, First Department, which held that "any creditor of the seller, whether his claim has been put in judgment or not, may sue under the Act." *Touris vs. Karantzalis*, 170 App. Div. 42, 45; and "that the remedy given by the statute was intended for the benefit of general creditors as well as judgment creditors." *Matter of Perman*, 172 App. Div. 14, 16.

In the recent case of *Willi vs. Lyon*, 226 N. Y. S. 283 (decided Jan. 5, 1928), the defendants' main contention in support of their motion to dismiss the complaint was that it did not allege that plaintiffs were judgment creditors, and that therefore an action brought under Sec. 44, Pers. Prop.

Law could not be maintained. Mr. Justice Frankenthaler, following the *Touris* case, *supra*, held that the remedy given by the statute was intended for the benefit of general creditors as well as judgment creditors.

There are some decisions by the Second Appellate Term and Special Term of the Supreme Court to the contrary (*Rubinsky vs. Spiro*, 60 Misc. 582; *Veit vs. Collins*, 39 Misc. 39), declaring that the provisions of the Bulk Sales Act are not available to other than judgment creditors. See also *Leon Hersch Corp. vs. Goldberg*, 126 Misc. 857, holding that the Section is applicable only to creditors who had reduced their claims to judgment at the time of the sale. "But these decisions are unsound and contrary to the weight of authority." See editorial *New York Law Journal*, Jan. 23, 1928.

A trustee in bankruptcy may maintain an action under the Act to have a bulk sale made by the bankrupt set aside as void, for the statute gives the right of action to creditors who were such at the time of the sale in case the provisions of the statute were not complied with. *Newman vs. Deverson*, 128 Misc. 105.

§ 163. **Inventory and Notice.** The statute requires only an inquiry by a transferee as to the creditors of his immediate transferor; he is not required to inquire as to the creditors of prior transferors. *Seeman vs. Levine*, 140 App. Div. 272, reversed on other grounds 205 N. Y. 514. Where a purchaser's inquiry disclosed no creditors, though carefully made, and he knew of none, he can buy the goods covered by the Act without inventory or notice. *Heilman vs. Powelson*, 101 Misc. 230. There is a sufficient compliance with the Act where notice is sent to creditors of the seller stating that the signer of the notice has bought the entire stock of goods of the seller for a certain stated price, that such amount will be credited on a debt owing to the purchaser, and that he will take possession of the goods five days after the date of such notice. *Thomas vs. Blizzard*, 170 N. Y. S. 11, N. Y.

§ 164. **Purchaser as Receiver.** By providing that where inventory and notice has not been made, the purchaser shall become a receiver, it is meant that he shall be deemed to hold the property as trustee for the benefit of creditors without having actually to be appointed receiver. He will be required to hold the property and account therefor as receiver, and if the creditors' interests require it, the Court may ap-

point another receiver and require the purchaser to account to him for the property. *Matter of Perman*, 172 App. Div. 14. Where the action by a creditor to compel the purchaser to restore the goods is not brought until long after he has sold the goods and parted with them, he cannot be held in contempt for failing to comply with an order to restore the specific goods. *Cowen vs. Gruber*, 162 N. Y. S. 1053. The fundamental rule of receivership that all creditors should share alike applies to this Act. *Caro vs. Brachfeld*, 163 N. Y. S. 511.

§ 165. **Miscellaneous Decisions Relating to Bulk Sales Act.** The constitutionality of the Bulk Sales Law was upheld by the Court of Appeals in *Klein vs. Maravelas*, 219 N. Y. 383, declaring that the statute violated no clauses of the federal or state constitution and thereby overruling an earlier erroneous decision (*Wright vs. Hart*, 182 N. Y. 330).

The statute, being in derogation of the common law and of one's rights to dispose of his own property without restriction, must be strictly construed. *Mott vs. Reeves*, 125 Misc. 511, 512; *aff'd* 217 App. Div. 718 *mem.*; *aff'd* 246 N. Y. 567, *mem.*

Actual fraud is not essential to invalidate the transfer under the Bulk Sales Law. It does not matter at all that the sale was made in good faith, nor that full value was paid for the goods and the money applied in payment of the seller's debts, failure to comply with the requirements as to inventory and notice will render a sale of stock of goods in bulk absolutely void. *Kirkholder & Rausch Co. vs. Bridgland*, 120 Misc. 565.

CHAPTER XV.

CONDITIONS AND WARRANTIES.

§ 166. **Foreword.** The conditions referred to in this chapter are not the express or implied conditions that payment and delivery are to be concurrent or that title is to remain in the seller until all the installments of the purchase price are paid. These conditions have already been discussed in connection with cash sales (Sec. 8 *infra*) and conditional sales, properly so called (Sec. 9 *infra*). The conditions herein discussed are those referred to in Sec. 92, Pers. Prop. Law; e. g. a contract of sale subject to an export license being granted by a foreign government (*Pressprich & Son Co. vs. Nemours Trading Corp.* 199 App. Div. 1); a contract of sale subject to the approval of the seller's credit department (*Alexopoulos vs. Nemours Trading Corp.*, 205 App. Div. 39); or where the seller agreed to accept the buyer's order only if an unconditional letter of credit was issued (*Isaion vs. Standard Rice*, 208 App. Div. 20); or where the contract of sale provided that the seller should make shipments within a time specified, "subject, however, to railroad accepting shipments" (*Consolidated Co. vs. Picard, Co.*, 210 App. Div. 233); or where the contract provides "no arrival, no sale" (*Strahl vs. Herbst*, 159 N. Y. S. 718). "Conditions in contracts have been divided according to the period of time at which they come into operation, into precedent conditions, concurrent conditions, and subsequent conditions. It is only the first of these which is material here in connection with the subject of warranty, and when the word 'condition' is used alone, it is generally a condition precedent which is meant." Williston on Sales, Sec. 179.

§ 167. **Effect of a Condition in Contract of Sale.** Where the obligation of either the seller or the buyer in the contract of sale is subject to any condition which is not performed, the other party may refuse to proceed with the contract or he may waive performance of the condition. Sec. 92, Pers. Prop. Law.

If one party has promised that the condition should happen or be performed, the other party may treat the nonperformance of the condition as a breach of warranty. Sec. 92, Pers. Prop. Law.

Where title has not passed, the buyer may treat the performance of the condition by the seller as a condition precedent to the performance of his promise to accept and pay for the goods. Sec. 92, Pers. Prop. Law.

§ 168. **Decisions Showing Effect of Condition.** Where the buyer signs and delivers an order to the seller's salesman with the understanding that it shall not take effect until the buyer has given his assent to certain memoranda which are to be submitted to him, there is no contract entered into. *Dietz vs. Farish*, 79 N. Y. 520. Where it was the understanding between the parties that the sale be subject to the approval of the seller's credit department, such approval is a condition precedent to the contract taking effect, and the seller may be allowed to prove the understanding by parol evidence, if it does not change the terms of the written agreement. *Alexopoulos vs. Nemours Trading Corp.*, 205 App. Div. 39. Where the seller had agreed to accept the buyer's order only if an unconditional letter of credit was issued, and the letter of credit contained conditions as to shipment which were not acceptable to the seller, it was held that no contract existed. *Isaion vs. Standard Rice*, 208 App. Div. 20. Where the contract of sale stated "sold—good quality chestnuts" reported by cable to be afloat a certain named steamer scheduled to be due in New York Nov. 27, 1916, and the steamer arrived on Dec. 2nd, it was held that the buyer was not obliged to take and pay for the goods as the contract was conditioned upon the arrival of the steamer with the goods described in the contract upon it (i. e. "good quality chestnuts"). No goods of that description arrived on that steamer and the contract to sell was therefore at an end. *Kirsh vs. Benyunes*, 105 Misc. 648. Where a written contract for the sale by the plaintiff to the defendant of thirty tons of casein contained the clause: "Shipment: May-June from Europe. Advice of shipment to be made by cable immediately goods are dispatched," it was held that advice of shipment by cable was a condition precedent to the buyer's liability and that the seller was barred from recovery from the buyer; by failure to give notice according to the terms of the contract. *Jungmann & Co., Inc. vs. Atterbury Bros., Inc.*, 249 N. Y. 119.

§ 169. **Warranties.** The maxim *caveat emptor* (let the buyer beware) is as old as the common law itself. "The common law took a sporting view of the dealings between buyer and seller, and did not wish to discourage skill in barter

by stressing too much any ethical considerations. At the present day, however, both law and trade morality have advanced a long way beyond this primitive conception of the rights of buyer and seller. Nearly all trade transactions are now based on certain contract conditions, expressed or implied, by which the risk to the buyer is largely eliminated. A change of property for a consideration rarely takes place without some conditions or warranties as to quality, utility, or other characteristics of the commodity sold." Conyington, Business Law, Sec. 108.

"In the early English law promises implied in fact were not recognized and the doctrine of *caveat emptor* was carried so far that unless the seller expressly said that he warranted the goods there was no obligation imposed upon him in regard to their quality." Williston on Sales, Sec. 183.

But today warranties may be either express or implied. Where an implied warranty is presumed to exist, the burden of proving that it did *not* exist is on the seller. But where an express warranty is alleged, the burden of proving its existence is on the buyer, it being an affirmative defense. Turl vs. Williams Engineering Co., 136 App. Div. 710.

§ 170. **Express Warranties.** "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon." Sec. 93, Pers. Prop. Law.

No particular phraseology is necessary to constitute an express warranty. Oneida Co. vs. Lawrence, 4 Cow. 440. It is not necessary that the words "I warrant" be used. But there must be an express and direct affirmation of the kind, character or description of the goods upon which the purchaser relies. Chapman vs. Murch, 19 Johns. 290. It must be a representation which the buyer relies on and which is understood by the parties as an absolute assertion and not the expression of an opinion.

It is not necessary that the seller should have intended the statement or representation to be a warranty. Fairbank Canning Co. vs. Metzger, 118 N. Y. 260. It is sufficient, if the representation be positive, not merely matter of opinion, and the buyer understands it to be a warranty, and relies upon it; the seller is then bound by the warranty no matter whether he intended it to be a warranty or not. He is responsible for the language he uses, and cannot escape lia-

bility by claiming that he did not intend to convey the impression which his language was calculated to produce upon the mind of the buyer.

It is not essential to the binding effect of a warranty that the seller should know it is false. The good faith of the seller is no defense to an action for breach of warranty. *Fowler vs. Anderson*, 132 App. Div. 603; *Brisbane vs. Parsons*, 33 N. Y. 332.

Where the buyer has had a chance to examine the goods before purchase and does examine the goods, he cannot rely on any warranty either express or implied as to defects which were visible and apparent on inspection. Subd. 3, Sec. 96, Pers. Prop. Law. The doctrine of *caveat emptor*, "let the buyer beware," applies to such a case.

Not everything a seller says about the goods is construed as a warranty. "No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty." Sec. 93, Pers. Prop. Law. The test is whether what was said by the seller relates to a matter of *fact* about the goods rather than a matter of opinion. Where in order to induce a purchase of a suit of clothes the seller said, "that suit will wear like iron," the statement is merely an expression of opinion and not a warranty, *Harburger vs. Stern Bros.*, 189 N. Y. S. 74. Mere opinion is not a warranty for the reason that although the buyer may be influenced by it, he should know that it may or may not be true. "Purchasers are presumed to know that the vendor will, if asked as to value, place it as high as he thinks the property will bear, and on the other hand, the vendor knows that the purchaser will endeavor to convince him that the property is worth considerably less. 'It is naught, it is naught,' saith the buyer, 'but when he has gone his way, he boasteth.'" *Morgan vs. Hodge*, 145 Wis. 143. A statement by a saleswoman that a certain coat would conceal the wearer's physical condition is not a warranty, *Stern vs. Norwood*, 169 N. Y. S. 545. A representation that a car is a high grade automobile is not a warranty that it makes no noise, *Huester vs. Paige Co.*, 209 App. Div. 294. But a representation by the seller's salesman that a certain truck which had been assembled by the seller would give more power than a new Ford car and that it was in fact better than a new one, is a warranty, *Gilmore vs. Butts*, 198 App. Div. 108.

It is sometimes difficult to distinguish opinion from statements of fact. For example, it has been held that a

statement by the seller that a derrick for use in a particular place would require a load of 250 tons to break it was an express warranty, *Miller vs. Patch Mfg. Co.*, 101 App. Div. 22; and that a representation that seed peas would "pick 4 or 5 days earlier than any other seed on the market" was an express warranty, *Landreth vs. Wyckoff*, 67 App. Div. 145. The following statements were held *not* to be warranties: that hogs were suitable and proper for the New York City market, *Bartlett vs. Hoppock*, 34 N. Y. 118; that a machine was in very good condition, *Ginsberg vs. Lawrence*, 121 N. Y. S. 337; that roses were very fine stock, *Stumpp Co. vs. Lynber*, 84 N. Y. S. 912; that books were very fine reading matter, fit for everybody to read, *St. Hubert Guild vs. Quinn*, 64 Misc. 336.

It is well settled that a representation by a seller of the value of property sold is to be regarded as an expression of opinion only. For example, a representation that the stock of goods in a certain store was worth a specified sum, while an inventory taken the following day showed a smaller value, is entirely an express of opinion, *Wheelock vs. Bennett*, 207 App. Div. 89. But if a representation as to the value of goods is accompanied by a representation as to their quality, there is a warranty, *Dorries Co. vs. Howe*, 198 N. Y. S. 673. See also *Titus vs. Poole*, 145 N. Y. 414, where it was held that statements regarding the value of corporate stock were warranties. A statement as to the cost price of certain stock has been held to be a warranty, *Petty vs. Fish*, 31 Misc. 739.

Where goods are sold and delivered with an express warranty and the buyer subsequently sends in an order for some more of the same goods and the order reads "same as sent," an express warranty made regarding the first lot will attach to the second, *Moore vs. King*, 57 Hun, 224, *aff'd* 134 N. Y. 596.

§ 171. **Liability of Principal for Warranty Made by Agent.** An agent employed to sell without express power to warrant cannot give a warranty which will bind his principal, unless the sale is one which is usually attended with a warranty. There must either be a custom to warrant, or express authority. But if the principal ratifies the act of his agent in making the warranty by bringing suit against the purchaser on the contract of sale, thus seeking to accept the benefits of the contract made by his agent, he will be liable for the unauthorized warranty, *Bernzweig vs. Fensterstock*, 176 N. Y. S. 836. Generally an agent warranting goods for

a known principal and with authority to warrant is not himself liable for a breach of the warranty, but the agent of an undisclosed principal may be personally liable for the breach of an unauthorized warranty made by him, *Lucks vs. Meserole*, 132 App. Div. 20. But even if a salesman has no authority to make an express warranty and there is no custom for him to do so, implied warranties may exist where the buyer had reason to rely upon the judgment and skill of the seller and in fact did so rely, *Oetjen vs. Whitehead Co.*, 126 Misc. 369.

Where the parties have reduced a contract of sale to writing in such terms as to show that they intend it to be a complete statement of their obligations, an additional *express* warranty cannot be shown by parol, *Seitz vs. Brewer's Refrigerating Mach. Co.*, 141 U. S. 510; *Eighmie vs. Taylor*, 98 N. Y. 288. But if the writing does not purport to cover the whole contract, an *express* warranty outside of it may be shown, *Filkins vs. Whyland*, 24 N. Y. 338; *Briggs vs. Hilton*, 99 N. Y. 517; *Lesin vs. Shapiro*, 147 App. Div. 100.

§ 172. **Implied Warranties.** "Warranties which the law implies may be shown although not expressed in the contract, and such warranty may be implied although the facts from which it is implied do not appear in the contract." *Sampson vs. Pels Co.*, 199 App. Div. 854. See also *Carleton vs. Lombard*, 149 N. Y. 137; *Landrath vs. Wyckoff*, 67 App. Div. 145. Implied warranties attach to a written as well as to an unwritten contract, and may be shown although not specified in the contract, *Cohen vs. Merkel*, 215 App. Div. 435. A warranty may be implied from facts appearing outside the contract. Thus where it appears that yarn was bought for embroideries, there is an implied warranty of fitness for that purpose, *Gillespie vs. Cheney*, 2 Q. B. 59. That a sale of certain articles is in writing, expressing no warranty, will not prevent the warranty by implication from attaching, *Hoisting Engine Co. vs. Hart*, 237 N. Y. 30. But an express refusal to warrant, contained in a written instrument of sale of personal property, negatives the warranties implied by statute, and precludes the defendant from setting up an alleged breach of a parol warranty or sale by sample, *Strook & Co. vs. Lichtenthal, Inc.*, 129 Misc. 288.

An implied warranty is collateral to a contract of sale; so, unless there be a sale with transfer of title, no implied warranty can exist. Therefore, it has been held water sup-

plied by a municipality to its citizens is not impliedly warranted as to its fitness, *Canavan vs. Mechanicsville*, 229 N. Y. 473.

Nor does the law imply a warranty of quality where both parties manifestly have the same knowledge and opportunities of inspection and where the seller had no more opportunity of inspecting the condition of the article sold than the buyer had and the buyer knew of that fact, *Gage vs. Carpenter*, 107 Fed. 886. In *Canavan vs. Mechanicsville*, 229 N. Y. 473, it was held that although a city which supplies water through mains and pipes is a dealer in water, the purchaser cannot assume that the city has an opportunity to examine all the water so furnished by it through pipes to its inhabitants and hence the city is not liable on an implied warranty of fitness.

Where a specific article is sold "as is" by an agreement in writing containing no express warranties, it has been held that the sale is accompanied by no implied warranties, *Mizroch vs. Oakland Car Co.*, 192 N. Y. S. 769; *Drumm vs. Albany Garage*, 198 App. Div. 949. But a seller who represented certain coal to be good and knew for what purpose it was to be used, was held to an implied warranty, although he sold it "as is," *Morris Co. vs. Carthage Co.*, 210 App. Div. 878.

§ 173. **Implied Warranties of Title.** In Sec. 94, Pers. Prop. Law, it is provided that—

"In a contract to sell or a sale, unless contrary intention appears, there is

"1. An implied warranty on the part of the seller that in case of a sale *he has a right to sell the goods*, and that in case of a contract to sell he will have a right to sell the goods at the time when the property is to pass;

"2. An implied warranty that the buyer shall have and enjoy *quiet possession* of the goods as against any lawful claims existing at the time of the sale;

"3. An implied warranty that the goods shall be *free* at the time *from any charge or encumbrance* in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made;

"4. This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee or other person professing to sell by virtue of authority in fact or law goods in which a third person has a legal or equitable interest."

In the case of breach of an implied warranty of title under Subd. 1, only nominal damages can be recovered until the true owner has recovered a judgment in an action of replevin or trover against the buyer. In which case, if he has paid the judgment, he may recover from his seller the amount of the judgment so paid, or if the chattel has been taken away from him under a writ of replevin by the true owner and the true owner's right and title have been established in the replevin action, the buyer can recover back the consideration he paid the seller for the chattel. But where there is a defect in his seller's title, the buyer need not wait until he is sued by the true owner, but, if he is satisfied that his seller's title is insufficient, and that the true owner would succeed in recovering the property or its value in an action of replevin or trover, the buyer may surrender the article to the true owner without waiting the commencement of the action, and then may sue his seller in an action for breach of implied warranty of title and recover the consideration he paid for the article. But if he did not so surrender the article to the true owner, and the true owner sued him, and recovered a judgment against him, the buyer's loss or damage is not established without proof of payment of the judgment, *Burt vs. Dewey*, 40 N. Y. 283.

As far as Subds. 2 and 3 are concerned, i. e. as to implied warranties against encumbrances and of quiet enjoyment, no damages except nominal damages can be recovered by the buyer until he has actually been disturbed in his possession or paid off the encumbrance.

It has been held that the implied warranty of title allows the vendee to resort only to his immediate seller. The lack of privity prevents an action against a remote seller, *Bordwell vs. Collie*, 45 N. Y. 494.

§ 174. **Implied Warranties of Quality.** The warranties of quality implied in a contract to sell are limited, in Sec. 96, Pers. Prop. Law, to two:

"1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

"2. Where the goods are bought by description from a seller who deals in goods of that description (whether he be

the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality."

At common law sellers who were merely dealers or retailers could not be held liable for the implied warranties of merchantability or fitness for a particular purpose, even though they had known that the goods were unmerchantable or had knowledge of the particular purpose for which the buyer wanted the goods. Only sellers who were growers or manufacturers were held liable upon those implied warranties of quality. The Statute (Sec. 96, Pers. Prop. Law, Subds. 1 and 2) by inserting the words "whether he be the grower or manufacturer or not" has abolished the distinction theretofore existing between sellers and makes all sellers liable upon implied warranties of quality.

The two implied warranties of quality are in some respects analogous. Thus, under the warranty of merchantability, the seller impliedly warrants that the goods sold are reasonably fit for the general purpose for which such goods are ordinarily used. On the other hand, under the implied warranty that the goods shall be reasonably fit for the purpose for which they are required, the seller warrants not only that the goods shall be fit for the general purpose for which such goods are ordinarily used, but that they will be adequate to meet the specific need for which the purchaser requires them. Williston on Sales, Sec. 235.

When the purchaser relies upon the seller's judgment to furnish an article which will meet a definite required purpose, as known to the seller, the seller then becomes liable in damages if the goods do not satisfy that purpose. Thus, where coal was purchased for a steamer, to be delivered to the steamer's bunkers, and the coal, although it was satisfactory for fuel purposes, was not available for use on a steam vessel, the seller was held liable to the buyer for breach of an implied warranty of quality. *Steamship Angelo Toso*, 271 Fed. 245.

In *Strongitharm vs. North Lonsdale Steel Co.*, 21 Times L. R. (English) 357, it was held that when limestone is purchased to be used in an iron smelting plant, and this is made known to the seller, the seller is bound to furnish not ordinary limestone, but limestone that can be satisfactorily used in an iron smelting plant.

In regard to the implied warranty of merchantability, the Court in *Jones vs. Just*, L. R. 3 Q. B. 197, said: "It appears to us that, in every contract to supply goods of a spe-

cified description which the buyer has no opportunity to inspect, the goods must not only in fact answer the specific description, but must also be saleable or merchantable under that description." The word "merchantable" means at least of medium quality or goodness, *Howard vs. Heoy*, 23 Wend. 350.

The implied warranties of merchantability or fitness for a particular purpose do not apply in the following cases:

1. Where the buyer has examined the goods and the defects are such as ought to have been revealed by such examination. Subd. 3, Sec. 96.

2. Where a specified article is sold under its patent or trade name there is no implied warranty as to its fitness for any particular purpose, Subd. 4, Sec. 96, as the buyer is presumed to rely on the trade name as his guide for fitness (see *Sure Seal Co. vs. Loder*, 171 App. Div. 225); but there is an implied warranty of merchantability, *Bencoe Exporting & Importing Co. vs. McGraw Tire Co.*, 212 App. Div. 136. Where, however, a purchaser of oil, although sold under a trade name, but upon the statement of the seller that the oil was proper to use for the purposes of the buyer, there is an implied warranty of fitness under Subd. 1, Sec. 96. *Sachter vs. Gulf Co.*, 203 N. Y. S. 769. But where the subject of a written contract of sale is a definite described article, there is no implied warranty that it will accomplish the purpose for which the purchaser bought it, though such purpose was known to the seller. *Leverette vs. New London Ship & Engine Co.*, 24 Fed. (2nd) 524, C. C. A. 5th Cir.

3. Where the buyer knows that the seller has not seen or examined the goods and had no more opportunity of inspecting their condition prior to the sale than he had, *Gage vs. Carpenter*, 107 Fed. 886; *Hoisting Mach. Co. vs. Federal Terra Cotta Co.*, 179 App. Div. 653.

At common law an implied warranty (as for example, that wool is not falsely or deceitfully packed in bales) could not be established by proof that it was a general custom or usage of persons dealing in the article thus to contract, *Barnard vs. Kellogg*, 10 Wall. 383. But under Subd. 5, Sec. 96, any implied warranty as to quality or fitness for a particular purpose may now be annexed by the usage of trade.

At common law an express warranty with reference to quality precluded an implied warranty with reference thereto, even though it related to a different quality. For example, if S expressly warranted that certain cloth will not shrink and

says nothing about its color being fast, his express warranty shut out the implied warranty that the color is fast. But under Subd. 6, Sec. 96, an express warranty or condition does not now negative an implied warranty, unless inconsistent therewith.

§ 175. **Implied Warranty of Fitness of Food for Human Consumption.** At common law, upon the sale of provisions for human consumption there arose an implied warranty that they were wholesome and fit for use as food. *Race vs. Krum*, 222 N. Y. 410. Under Subds. 1 and 2 of Sec. 96, there is still such an implied warranty in such a sale. "The mere purchase by a customer from a retail dealer in foods of an article ordinarily used for human consumption does by implication make known to the vendor the purpose for which the article is required." *Rinaldi vs. Mohican Co.*, 225 N. Y. 70. In that case the plaintiff had bought meat from a retail butcher and was made ill from eating it. He was allowed to recover damages from the retailer for breach of the implied warranty of fitness for use as food, although the retailer sold the meat in the original package in which he had received it from the wholesaler and although it bore the stamp of the United States Government inspector that it was sound and wholesome. It should be observed that the purchase having been made in the original package, the seller had no more opportunity to learn of the condition of the meat than the buyer. But in *Lieberman vs. Sheffield Farms*, 191 N. Y. S. 593, where a retail dealer of milk in tightly sealed bottles was held liable on an implied warranty of fitness, although the milk was not bottled by him, but certified by the Milk Commission of the Medical Society of the County of Kings, the Court said that the dealer is in a better position than the retail purchaser to know and ascertain the reliability and responsibility of the manufacturer. The responsibility should be placed upon the party to the contract who is best able to protect against the original wrong and to recoup himself against loss, by reason of the fact that he knows and comes in touch with the manufacturer.

It has been suggested that where food is furnished by a hotelkeeper to a guest as part of his meal in the dining room of the hotel and the guest pays a lump sum to the hotelkeeper for his room and board, there is no implied warranty of fitness of the food for human consumption, because there is strictly speaking *no sale of the food to the guest*. It is said there is no sale because the parties never intended title to

pass (Beale: Innkeepers, Sec. 169). The title to and risk of loss of the food is at all times in the hotelkeeper until it enters the mouth of the guest. But the argument seems fanciful and is not recognized by the New York Courts. In *Temple vs. Keeler*, 238 N. Y. 344, the Court said: "A hotelkeeper who places before his guests at dinner partridges, sells the birds, although the guests paid a total sum for board and lodging (*People vs. Clair*, 221 N. Y. 108). A customer enters a drug store, orders a portion of ice cream, receives it, eats it, and pays for it. "This is a sale (*Race vs. Krum*, 222 N. Y. 410). A customer enters a restaurant, orders a portion of fish, eats it and pays for it. This is likewise a sale.

"Under such circumstances, the buyer does by implication make known to the seller the particular purpose for which the article is required, and where in addition thereto it appears that the vendor has an opportunity to examine the articles sold, it appears conclusively that the purchaser relies upon the vendor's skill and judgment. Consequently, there is an implied warranty that the food is reasonably fit for consumption." See also *Muller vs. Childs Co.*, 185 App. Div. 88; *Barrington vs. Hotel Astor*, 184 App. Div. 317; *Leahy vs. Essex Co.*, 164 App. Div. 903.

A customer of a restaurant, sustaining injuries to his mouth and internally as a result of the presence of glass in food eaten in a restaurant, has a cause of action against the restaurant proprietor, for breach of implied warranty that food was fit for human consumption. *Bernstein vs. Queens County Jockey Club*, 225 N. Y. S. 449.

May the retail purchaser sue and recover damages from a wholesaler or manufacturer for breach of the implied warranty of fitness of food for human consumption, where the retail purchaser bought the food from a retail merchant to whom the wholesaler or manufacturer had sold it? In *Chysky vs. Drake*, 235 N. Y. 468, the question was squarely presented whether such an implied warranty extends to a wholesaler or manufacturer. In that case the plaintiff was employed as a waitress in a lunch-room for a weekly salary with board and lodging furnished. One day she received from her employer, as part of her lunch, a piece of cake which had been made and sold to him by Drake Bros. While she was eating it, a nail baked into the cake, in such a way that it could not be discovered by inspection, stuck in her gum, which became so infected as to necessitate the removal of three teeth. She brought an action to recover damages

for the injury so sustained, not against her employer but against Drake Bros., who had made the cake and sold it to her employer. The theory of her action was that Drake Bros. had impliedly warranted, when the cake was sold, that it was fit for human consumption, and that such implied warranty inured to her benefit. It was held that she could not recover as she had had no contractual relations with Drake Bros. Under the implied warranty of quality, as defined in Sec. 96, the manufacturer or wholesaler of food as well as other articles of personal property, is not liable to third persons who have no contractual relations with him. The Court of Appeals said: "The benefit of a warranty, either express or implied, does not run with a chattel on its resale, and in this respect is unlike a covenant running with the land, so as to give a subsequent purchaser a right of action against the original seller on a warranty." The Court pointed out that "under certain facts and conditions, the manufacturer of an article may be liable to a third person, even though no contractual relation existed between them, if the article sold were negligently prepared or manufactured," citing *MacPherson vs. Buick Motor Co.*, 217 N. Y. 382. But the plaintiff's case was not based upon the negligence of Drake Bros. The plaintiff limited her right to recover to a breach of warranty as shown by her specifically stating in her bill of particulars, "such breach of warranty by defendant she makes the issue in this action."

The doctrine of the *Chysky* case is not limited to food cases. In *Turner vs. Edison Storage Battery Co.*, 248 N. Y. 73, it was held where the plaintiff purchased from a dealer a storage battery manufactured by the defendant, he could not recover from the defendant for breach of warranty, either express or implied, as there was no contractual relation between the plaintiff and the defendant; and that is so, even if the goods had been sold by the defendant to the dealer with a so-called written and continuing warranty for the benefit of the ultimate purchaser. The Court said that a cause of action against the defendant for deceit might conceivably arise from such a transaction, but not for breach of warranty.

Where a food for babies, a dried milk product, which is liable to deteriorate, is sold by the manufacturer in sealed packages without any warning to indicate the possibility of deterioration, he may be held liable for negligence, *Rosenbush vs. Ambrosia Corp.*, 181 App. Div. 97. But the presence of a nail in a piece of cake is not in itself evidence of

negligence on the part of one who baked the cake and the rule of *res ipsa loquitur* does not apply to such a case, Shepard vs. Beck Bros. Inc., 225 N. Y. S. 438.

§ 176. **Liability of Manufacturer to Donee of Purchaser from Retailer.** In Coca-Cola Bottling Works vs. Lyons, 111 So. 305 (Miss. 1927), the defendant company, a manufacturer of bottled soda, sold to the B drug store. The plaintiff and a friend bought two bottles at this drug store, the friend ordering and paying for them both. The soda was consumed on the premises. The bottle served to the plaintiff contained some broken glass which caused injury. The plaintiff sued the defendant for breach of warranty. Judgment was given for the plaintiff and the defendant appealed. It was held that the plaintiff could recover on an implied warranty by the manufacturer of the purity of the drink to such of the public as became the rightful possessor and owner thereof.

Recovery by the sub-vendee for breach of warranty has been denied in New York on the ground that there is no privity of contract between the sub-vendee and the manufacturer. Chysky vs. Drake Bros. Co., 235 N. Y. 468. Such relief would *a fortiori* be denied to a donee. It has been pointed out, however, that the action for breach of warranty sounds in tort, as well as in contract, being based on deceitful appearances as false representations. Williston on Sales, Secs. 197, 244a. On this ground, recovery in the Coca-Cola case might be justified. 41 H. L. R. 263.

§ 177. **Implied Warranty in Sale by Description.** Sec. 95, Pers. Prop. Law, provides: "Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description, and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample, if the goods do not also correspond with the description."

Williston says that the term "contract to sell or sale by description should be confined to cases where the identification of the goods which are the subject-matter of the bargain depends upon the description." Sales, Sec. 224. This definition was quoted with approval in Maggioros vs. Edson, 164 N. Y. S. 377. Where the description is all that fixes the nature of the goods bargained for, the buyer may refuse to take goods tendered if they do not at least substantially fulfill the description, for the goods are not in such

a case within the terms of his promise to pay. In that respect the stipulation in regard to description is a condition (see Sec. 168 *infra*). It may also be treated as an implied promise that they shall conform to the description; i. e. as an implied warranty, so that not only will the buyer be excused from taking and paying for the goods if they do not fit the description (condition) but that the seller shall be liable if he fails to deliver goods of the kind described. If the goods are seen by the buyer and he agrees to purchase those goods, it is not a case of sale by description, even though the seller described them, and the seller's description was the inducement of the sale and even though the buyer's inspection could reveal nothing because the defect in quality was latent. Williston on Sales, Sec. 225. But there is an implied warranty that the goods shall be a merchantable quality under Subd. 2, Sec. 96, even though there is no implied warranty that the goods shall correspond with the description under Sec. 95.

A seller may contract to sell or sell by sample as well as by description. In such a case he does not under Sec. 95 perform his contract merely by delivering goods which in fact are exactly like the samples, if they do not also correspond with the description. See *Hosiery Co. vs. Goldstein Lasar Co.*, 188 N. Y. S. 460.

§ 178. **Implied Warranties in Sale by Sample:** Sec. 97, Pers. Prop. Law provides: "In the case of a contract to sell or a sale by sample:

"(a) There is an implied warranty that the bulk shall correspond with the sample in quality.

"(b) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in subdivision three of section one hundred and twenty-eight.

"(c) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample."

Where the contract expressly provided for inspection by the buyer and he inspected a part of the goods, he cannot rely on an implied warranty that the bulk will correspond to the sample shown. *Barnard vs. Kellogg*, 10 Wall. 383.

What is a sale by sample? The Court of Appeals has held that the mere act of exhibiting a sample is not sufficient

to give rise to an implied warranty under Sec. 97. It is usually a question of fact for the jury to decide, whether under all the circumstances the parties intended that the sale should be made in that way. *Henry vs. Talcott*, 175 N. Y. 385.

Mere exhibition of sample during preliminary negotiations for sale of cloth offers no basis for conclusion that seller made warranty that bulk should correspond with sample, where contract made no reference to sample. *Stroock & Co. vs. Joseph Lichtenthal, Inc.*, 229 N. Y. S. 371.

§ 179. **Warranties Survive Acceptance of the Goods.** What constitutes "acceptance" of the goods by the buyer will be hereinafter considered (Sec. 182 *infra*). Express warranties survived acceptance at common law but implied warranties did not. It is now provided by Sec. 130, Pers. Prop. Law, that "in the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor." So, today, all warranties, whether express or implied survive acceptance of the goods by the buyer. But where a limited period of inspection is set, no warranty survives that period. *American Waste Co. vs. St. Mary*, 210 App. Div. 383. And where a contract for the sale of cloth described as "La Parisienne" cloth contained a clause reading — "Spongers' or examiners' examinations or reports will not be recognized by us, and no claims or allowances, by reason of any examination or reports, or because of variation in patterns, quality, color, or for any other reason, will be allowed," it was held that the exculpatory clause was an express stipulation that there were to be no warranties surviving acceptance and that the clause was a bar to any assertion by the buyer of any claim with respect to merchandise which it did not reject. *Stroock & Co. vs. Joseph Lichtenthal, Inc.*, 229 N. Y. S. 371. The Court said: "It does not follow, however, that the plaintiff (the seller) was the sole judge of what it was to deliver. Its duty was to deliver La Parisienne cloth in a merchantable condition. It was not to deliver any particular kind of La Parisienne cloth, either first quality, or second quality. It performed fully if it delivered merchandise fairly

to be described as La Parisienne cloth, and in a merchantable condition."

§ 180. **Remedies for Breach of Warranty.** Under Sec. 150, Pers. Prop. Law, where there is a breach of warranty by the seller, the buyer has the election of the following remedies:

(1) Accept or keep the goods and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price, Subd. a, Subd. 1, Sec. 150.

(2) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty, Subd. b, Subd. 1, Sec. 150.

(3) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty, Subd. c, Subd. 1, Sec. 150. When the goods tendered by the seller do not conform to the warranty, they may be rejected by the buyer and in rejecting them, the buyer neither rescinds the contract nor waives the right to damages for breach of the contract. The buyer is entitled to a reasonable time after delivery in which to examine the goods and determine whether he desires to reject them. But if title had passed and the buyer subsequently discovers the breach of warranty, and rejects the goods and returns them to the seller, he cannot recover damages for breach of the warranty. He will be entitled to sue under Subd. d, Subd. 1, Sec. 150, for the return of the purchase price and for nothing more, *Apex Chemical Co. vs. Compton*, 171 N. Y. S. 60. A purchaser may institute an action for damages for breach of warranty before he has paid for the goods. Payment or an offer to pay is not a condition precedent to the commencement of the action. In such action, the seller has the right to interpose his counterclaim for the price. *Silberstein vs. Libby*, 122 Misc. 443.

(4) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them to the seller and recover the price or any part thereof which has been paid. Subd. d, Subd. 1, Sec. 150.

Before 1911 the buyer could not rescind the contract for breach of warranty; but now under Sec. 150, Subd. 1, Subd. d, he may, but of course he must return the goods to the seller if he rescinds. If the buyer has sold part of the goods before he discovers the breach of warranty, he can no longer rescind the contract because then the parties cannot be

put in *status quo*; but he can maintain an action for damages for breach of warranty. The buyer cannot rescind and recover the purchase price under Subd. d, and also sue for damages for breach of warranty under Subd. c. And if the buyer is sued for the price, he cannot set up both a counterclaim for the price on the theory of rescission and also a counterclaim for damages for breach of warranty. Norton vs. Dreyfuss, 106 N. Y. 90; Clark, Inc., vs. Greenwich Village Follies, Inc., 125 Misc. 78. Subd. 2, Sec. 150, provides that when the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted. The buyer must elect which one of the remedies he will resort to and having chosen one, he is bound by it.

There are three limitations to the buyer's right to rescind for breach of warranty. These limitations are found in Subd. 3, Sec. 150, and are as follows:—where the goods have been delivered to the buyer, he cannot rescind the sale

(1) if he knew of the breach of warranty when he accepted the goods. His only remedy then is to sue or counterclaim for damages for breach of warranty, Levy vs. Dettro, 91 Misc. 41;

(2) if he fails to notify the seller within a reasonable time of the election to rescind; or

(3) if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if the deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale.

If the buyer is going to rescind for breach of warranty, he must act with reasonable promptness in inspecting the goods and in returning them—this is especially so where the market for the goods is fluctuating, he will not be allowed to wait until a fall in price and then rescind and recover his purchase money. If the buyer retains the goods after acceptance, with no offer to return or with no notice that there has been a breach of warranty within a reasonable time after discovering the breach, his right of rescission is gone, but he may still sue for damages for breach of warranty. Salomin vs. Olkin, 91 Misc. 17. It has been held that notice of intention to rescind given more than thirty days after delivery and learning of the defects, is as

a matter of law not within a reasonable time, *Silberman vs. Engel*, 125 Misc. 816.

Where a diamond was bought on December 31, 1920, and the defect was not discovered until June, 1922, when notice of the breach of warranty was given and the buyer shortly thereafter sued the seller for damages for breach of warranty, the Court refused to dismiss the complaint. *Gleason vs. Lebolt*, 126 Misc. 216.

When the buyer elects to rescind for breach of warranty, and has given notice thereof within a reasonable time, he ceases to be liable for the price, upon returning or offering to return the goods. If the price or any part of the price shall have been paid, the seller becomes liable to return it upon the return or offer to return the goods, Subd. 4, Sec. 150. If the seller refuses to accept the offer of the buyer to return the goods, the buyer thereafter holds the goods as bailee for the seller, subject to a lien to secure the repayment of any part of the purchase price that has been paid, Subd. 5, Sec. 150. In *Kronish vs. Ginsburg*, 184 N. Y. S. 583, the plaintiff bought suits from defendant and rejected them upon inspection. As the seller refused to accept the return the suits were left in his hallway where they were stolen. Subsequently, the seller sued for the purchase price and being defeated demanded the goods from the buyer. No return being made, he brought suit for conversion. It was held that the title had never passed. It was the seller's duty to accept the return and he could not make the buyer his involuntary bailee. On the other hand, after the title had passed the seller is not obligated to take the goods back and take care of them, unless he consents to a rescission of the title. *Schmid vs. Klinck*, 189 N. Y. S. 534.

It is a condition precedent to a warranty surviving acceptance that the buyer notify the seller of the breach of warranty after acceptance and within a reasonable time after learning or being in a position to learn of it. And if the buyer seeks to defend the seller's action for the agreed price, on account of an alleged breach of warranty, he must plead the giving of such notice, and without such an allegation in the pleading, it has been held reversible error to admit evidence concerning the breach of warranty over the objection of the seller, *Regina Co. vs. Gately Furniture Co.*, 171 App. Div. 817. It has also been held that a counterclaim by a buyer counting on an alleged breach of warranty on the part of the seller is demurrable where it fails

to aver that the goods involved were returned or tendered back within a reasonable time or that the seller was notified within such time that the goods were of inferior quality and not up to the warranty. *Rothenberg vs. Shapiro*, 140 N. Y. S. 148.

§ 181. Measure of Damages for Breach of Warranty.
 The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty, Subd. 6, Sec. 150. Where there has been a breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty, Subd. 7, Sec. 150. Even though the goods are resold at a profit, the buyer is entitled to recover damages for breach of warranty, *Joannes Bros. vs. Lamborn*, 237 N. Y. 207. In an action for damages for breach of warranty of quality, the buyer cannot recover the whole purchase price, unless he shows that the goods sold were valueless. *Schneider vs. Hodgkins*, 178 N. Y. S. 281; *Frieder vs. Rosen*, 147 N. Y. S. 442.

The measure of damages set forth in Subds. 6 and 7, Sec. 150, purport to cover only general damages; special damages, if pleaded, may be recovered in addition thereto, provided it is shown that they were within the contemplation of the parties when the contract was made.

CHAPTER XVI

ACCEPTANCE OF THE GOODS AND BUYER'S RIGHT OF INSPECTION

§ 182. **Consequences of Acceptance.** If title has not passed before then, it will pass upon acceptance of the goods by the buyer. This must follow from the meaning of the word "acceptance" in the Law of Sales. Williston defines it as "an assent to become owner of specific goods offered by the seller." Williston on Sales, Sec. 482.

But although acceptance is an assent on the buyer's part to become owner of specific goods tendered by the seller, it is not an admission that the seller has performed his contract. Even after acceptance, the buyer, on proper notice, still retains the right to claim damages for defective performance and breach of warranty, and may even rescind the contract for breach of warranty if he had accepted the goods without knowledge of the breach, and is in a position to return the goods in the same condition in which they were received (Subd. 1 (d) and Subd. 3, Sec. 150, Pers. Prop. Law.)

Though the buyer may have assented to become the owner and thus accepted the goods, his acceptance, where he has had no opportunity for inspection or has not waived inspection, is subject to the condition subsequent that the goods conform to the terms of the contract.

§ 183. **What Constitutes Acceptance.** "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them." Sec. 129, Pers. Prop. Law.

"Acceptance has nothing to do with possession or delivery, for acceptance may precede delivery, and on the other hand delivery may take place without acceptance." Williston on Sales, Sec. 482. Receipt and acceptance are not synonymous terms in the Law of Sales. Goods are received by the buyer when they come into his actual or

constructive possession but they are not accepted by him until he has given his assent to become the owner. This assent may be given before the goods are received by him; the buyer may accept in advance such goods as the seller may appropriate. The assent may be given after the goods have been received and inspected or inspection waived. But the assent to become the owner of the goods is not an agreement on the buyer's part that the goods thus received fulfill in every respect the legal obligation of the seller. No such implication is necessarily contained in the word "acceptance." Indeed, after the buyer has assented to become the owner, he may still sue the seller for damages for breach of warranty, and if he was not aware of the defects in the goods at the time he accepted them and has given due notice of such defects within a reasonable time after he has discovered them, he may rescind the contract for breach of warranty, even after he has accepted the goods.

The following acts have been held to be an acceptance of the goods:

use of the goods by the buyer for five months with knowledge of the defects, *Chambers vs. Lancaster*, 160 N. Y. 342;

buyer's refusal to approve the article but still he continued to use it, *Hospital Supply Co. vs. O'Neil*, 10 Misc. 655, aff'd 155 N. Y. 634;

wearing a suit of clothes 30 days, *Powell vs. Morrell*, 121 N. Y. S. 225;

resale of the goods, *Richardson vs. Levi*, 69 Hun. 432;
alteration of the goods, *Bascom vs. Danville Stove Co.*, 182 Pa. St. 427;

mere retention of the goods beyond a reasonable time, *Mason vs. Smith*, 130 N. Y. 474;

payment after discovery of the defects, *Altschul vs. Koven*, 94 N. Y. S. 558.

The following acts have been held not to be an acceptance of the goods:

delivery to the buyer's ship, *Motley vs. Elmenhorst*, 142 App. Div. 830;

delivery forced on the buyer, *Wilson vs. Rushville Min. Co.*, 142 App. Div. 297;

giving a chattel mortgage on the goods, where there has been no opportunity for inspection, *Harrison vs. Scott*, 135 App. Div. 546, aff'd 203 N. Y. 369.

In *White vs. Schweitzer*, 221 N. Y. 416, the Court said: "It is not at all times easy to determine whether a purchaser's retention, sale or disposition of property constitutes an acceptance, but as a general rule it must be determined as a question of fact. It may be, and usually is, indicated by exercising acts of ownership, e. g. where one resells the goods, as such action would be improper except on the assumption that the buyer had acquired title. That necessarily indicates an assent on the part of the buyer to become the owner. If the article purchased is not in accordance with the contract, then the purchaser must upon discovering that fact, do nothing inconsistent with the vendor's ownership. So it has been held that an acceptance is made out by action of the vendee in insuring the goods or offering to mortgage them, or by loaning them, or by directing an agent to sell them, or, while disclaiming a purchase, permitting a third person to select and retain a portion of the goods upon his promise to account to the seller from them."

Where the seller installed an oven in the buyer's bakery and after it had dried out, it did not work and the buyer gave notice of rescission to the seller, but nevertheless subsequently leased the bakery together with the oven to another baker, it was held that the leasing of the oven constituted an acceptance of it after knowledge of the alleged breach of warranty, and prevented a rescission of the sale. *Peterson Oven Co. vs. Guarino*, 223 N. Y. S. 107.

If the buyer decides to rescind the sale, he must act promptly and unequivocally, and within a reasonable time after receiving the goods. He must clearly manifest his intention not to keep the goods. *Silberstein vs. Blum*, 167 App. Div. 660. The mere retention of the property by the buyer may show an acceptance as a matter of law, after the lapse of a reasonable time. *Nash vs. Weidenfeld*, 41 App. Div. 511, *aff'd* 166 N. Y. 612; *Ferguson vs. Netter*, 204 N. Y. 505.

The subject of acceptance by the buyer is well treated in Judge Danforth's opinion in *Brown vs. Foster*, 108 N. Y. 387—"The plaintiff then became subject to the general rule that one who seeks to reject an article as not in accordance with the contract must do nothing after he discovers its true condition inconsistent with the vendor's ownership of the property. He would in such a case as the present be entitled to a reasonable time for examination; long enough to put the machinery in motion and see it operate and he might for that purpose do with it whatever was necessary,

and if after such examination, without dealing with it in any other way or for any other purpose, he rejected it, acceptance could not be implied. The evidence in this case, however, permits an inference that the plaintiff exercised a dominion over the machinery inconsistent with ownership in the defendants, and consistent only with title as well as possession in himself. He used the machinery in the prosecution of his business, and although complaining did not intermit its use. Knowing its defects he continued to run it. * * * The continued use of the machine in the promotion of his own business interests, with knowledge of its imperfections, was an unequivocal act of acceptance which no words of his could qualify (*Reed vs. Randall*, 29 N. Y. 358; *Beck vs. Sheldon*, 48 N. Y. 365; *Dutchess Co. vs. Harding*, 49 N. Y. 321)."

However, in *Greeff Engineering & Mfg. Co. vs. Scourene*, 182 App. Div. 311, the defendant had used a drying machine after complaining that it did not comply with the sales guaranty. Alterations were made by the seller and the buyer thereafter used the machine. The Court held that this use did not as a matter of law constitute an acceptance, but created a question for the jury as to whether or not there has been an acceptance barring a rescission by the buyer, reasoning that the defendant should have a reasonable time after the last alterations had been made to determine whether or not the machine properly could do the work according to the guaranty.

A somewhat similar case is *Day vs. Pool*, 52 N. Y. 416, where there was a contract by which the defendants undertook to sell rock-candy syrup to the plaintiffs and warranted that it "could not crystallize, or the sugar fall down" in its use. The syrup was delivered in small parcels, at different times. The plaintiffs complained of the deficiency of the syrup at various times to the defendants while they were delivering it, and the defendants promised to correct it (though they insisted it was then sound). If not, they could "do it at the end." The plaintiffs proceeded to use the syrup in their business of wine manufacture, and neither returned nor offered to return it. They paid for it in full and brought an action for damages for breach of warranty. It was held that the plaintiffs might recover as they had given notice of the defects in the syrup at an early stage and the defendants promised to attend to it. The Court said: "They also apparently acquiesced in the plaintiffs' use of it, virtually promising to make it right if it did not prove to be

sound rock-candy syrup. It would scarcely be just now to allow the defendants to take advantage of the non-return of the syrup under such circumstances."

In *Liquid Carbonic Corp'n vs. Caroombas*, 230 N. Y. S. 529, the action was brought by a conditional seller for the balance due on the purchase price of a soda fountain, carbonator, and frigidaire system. The defendant counterclaimed for breach of warranty, also alleging a rescission of the contract of sale. The apparatus had been installed in defendant's shop on April 3, 1926, and complaints were made by him regarding the operation of the system during July and later months of the same year. The first attempt by defendant to rescind the contract was found in a letter dated October 25, 1926. The Court found that defendant had lost his right to rescind the contract as a matter of law, and set aside a verdict of the jury which had been in defendant's favor on the counterclaim, holding that there was no question for the jury.

§ 184. When Buyer Has Right to Inspect the Goods. The buyer always has the right to inspect the goods to see if they conform to the contract, unless it otherwise is agreed. But if the right of inspection is to be of any value or protection to the buyer, it must either be a condition precedent or condition subsequent to his obligation to take and pay for the goods. In other words, inspection of the goods by the buyer may be a condition precedent to title passing or a condition subsequent. It is often important to determine which it is, because if it is a condition precedent, the risk of loss until inspection rests on the seller and the seller cannot maintain an action for the price until the goods pass inspection; but if it is a condition subsequent risk of loss before inspection is on the buyer and the seller may maintain an action for the price prior to inspection.

§ 185. Right of Inspection as a Condition Precedent to Transfer of Title. The buyer's exercise of the right of inspection is a condition precedent to the passing of title in the case where the contract of sale required the seller personally or through his own paid agents or employees to deliver the goods to the buyer.

Where by the terms of the contract the seller is to deliver the unascertained goods to the buyer personally and not through a carrier, and there has been no previous assent by the buyer to any act of appropriation by the seller, the buyer does not assent to delivery to himself personally as

an appropriation, unless he either examines the goods on delivery and finds them satisfactory or takes them in without examination, thereby waiving inspection as a condition precedent to the passing of title. "In other words delivery when made directly from one party to the other requires assent to take as well as assent to give. Accordingly, the buyer, by refusing to take the goods, can always prevent delivery and thereby, where the property is not to pass until delivery, prevent it from passing. For this purpose it is quite immaterial why the buyer refuses to take the goods, or whether his reason is a just one." Williston on Sales, Sec. 472. See also *Reichbart vs. Smith-Eisemann Corp.*, 199 App. Div. 571; *Harbison vs. Propper*, 183 N. Y. S. 508, 511; *Prager vs. Scheff*, 107 Misc. 500. "The situation must be distinguished from cases where the buyer has given authority to the seller to appropriate goods for him or deliver them to a third person for him. In such cases the previous assent of the buyer to this mode of dealing with the goods effects a transfer of the property when the seller carries out the authority given him." Williston on Sales, Sec. 472. But this will be true only if the authority is exactly followed. Williston on Sales, Sec. 278. "It might be urged that where the contract provides for the direct delivery of the goods to the buyer, there also the seller is given an authority, and the mere unloading them at the buyer's place of business would operate as a transfer of the property. But presumably because of the ease of getting the immediate assent or dissent of the buyer in such a case, the law implies no authority on the part of the seller to transfer the property by the mere surrender of the goods at a place where they will be in the buyer's control. Nor does the mere assent of the buyer to take the goods into his physical control operate as a transfer of the property. He is entitled to examine the goods in order to decide whether he will become owner and unless the examination is completed or waived, he is under no obligation to accept the goods." Williston on Sales, Sec. 472. See also *Pierson vs. Crooks*, 115 N. Y. 539. "And if inspection is had and the goods are what they should be, the wrongful rejection of them will prevent the property from passing." Williston on Sales, Sec. 472. Not only is inspection, but acceptance also, is a condition precedent to transfer of title in the situation under discussion, but neither inspection nor acceptance is a condition precedent to the buyer's liability on the contract. Although the buyer for any reason or no reason may reject the goods when tendered and thus prevent

title passing to himself, he may be liable to the seller for damages for breach of the contract, unless his reason for refusing to take and pay for the goods is a good one.

In *Glass & Co. vs. Misroch*, 239 N. Y. 475, there was a contract for the sale of unascertained goods providing for delivery to the buyer personally. The seller's truckman delivered the goods to the buyer's place of business and the buyer took them in without examining them. The next day the buyer wrote to the seller informing him that as the goods were defective, he rejected them and would not, therefore, pay the agreed price. In an action by the seller to recover the price, the buyer argued that goods are not appropriated to a contract with the assent of the buyer so as to pass title until the buyer has had a reasonable opportunity to examine and test the goods after their arrival. But the Court of Appeals, through Cardozo, J., said that if that were so, the passing of title might be indefinitely postponed, for the reasonable time within which a buyer is privileged to return the goods if found to be defective will vary according to the nature of the goods, and according to whether the defects were obvious or concealed and would not appear until the goods had been used. A buyer might let the goods lie in his shop one or two years before using them. Surely no one could seriously contend that title did not pass until such test or use was made. "Assent to appropriation is something more immediate and certain. Anything which signifies the buyer's willingness to take as his own the goods appropriated by the seller, subject to rescission and return if defects are afterwards discovered, is an assent by the buyer and title will pass." It was therefore held that since the buyer had waived inspection and acceptance as a condition precedent to title passing by taking in the goods without examination, title had passed to him on delivery subject to rescission and rejection, but as the goods were found to be as ordered, the attempted rescission would not be allowed and the buyer was liable for the price.

Since in the situation under discussion the buyer is entitled to inspect the goods before determining whether he will take them, a refusal on the part of the seller to allow opportunity for inspection justifies the buyer in refusing to fulfill the contract. Sec. 128, Pers. Prop. Law, provides:

"1. Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable op-

portunity to examine them for the purpose of ascertaining whether they are in conformity with the contract.

"2. Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract."

It should be remembered that the two subdivisions of Sec. 128 just quoted refer only to cases where the contract of sale requires the seller to deliver the goods to the buyer personally, and not through a carrier, and where there has been no previous assent by the buyer to an act of the seller in appropriating the goods to the contract. And, obviously, they do not apply to a case where the goods were specific at the time of the bargain. They do not apply to a case where title has passed prior to delivery. After title has passed, there is no right to inspect before acceptance of delivery, *Brown vs. Raritan Chem. Works*, 188 App. Div. 578; except for the purpose of ascertaining whether title should be divested.

In *Samuels vs. Samis*, 124 Misc. 35, the defendant had ordered fixtures to be made specially for him, and deposited \$75 on account. The merchandise was delivered on a truck in front of defendant's place of business and he was ready to pay the balance. But the plaintiff refused to unload the truck to afford the buyer an opportunity for examination. This was a breach of contract under Subd. 2, Sec. 128, and it was held that the plaintiff was not entitled to recover the purchase price, but that the defendant, on his counterclaim, was entitled to judgment for the amount of his deposit.

In *Economu vs. Schwartz*, 198 App. Div. 73, the plaintiff had ordered two rings to be manufactured according to sample and had deposited \$100 to insure performance on his part. When the settings were completed, the buyer inspected and rejected the rings and sued to recover his deposit. The seller counterclaimed for the balance of the price. It was held that a judgment for the defendant should be reversed, as title had not passed, since, no assent to any previous appropriation having been made, the buyer's inspection and refusal to accept the tender, prevented the passing of the title. The Court said: "It is now well settled that if goods are to be manufactured according to sample, the purchaser has the right to examine the goods and to ascertain whether they comply with the contract. The mere setting aside of the goods so manufactured by the vendor, is not

sufficient (*Cooke vs. Millard*, 65 N. Y. 357; *Funt vs. Schiffman*, 115 Misc. 155). The plaintiff buyer who upon examination immediately rejected the goods, cannot be held to have accepted them."

Where the contract expressly provides for delivery of the goods by the seller to the buyer at a certain place for inspection, a delivery for inspection passes no title, *Larkin vs. Geisenheimer*, 201 App. Div. 741, *aff'd* 235 N. Y. 547. In that case the contract provided that the plaintiff should sell to the defendant 90 cases of tacks according to sample and deliver them free alongside ship New York, but before transporting them to the ship, to deliver them to defendant's storerooms at 134 Cedar Street, New York City, for inspection. The defendant was under contract to export the goods to Brazil. The plaintiff had the tacks manufactured by a manufacturer at Cleveland, Ohio, and after their arrival in New York caused them to be delivered at defendant's storerooms for inspection on a Saturday. The defendant at once notified plaintiff that he would inspect them the following Monday, which he did, and immediately thereafter notified the plaintiff that he refused to accept the goods and requested plaintiff to remove them. In an action for the price, it was held that the seller could not recover as title could not pass before a delivery was made by the plaintiff free alongside the ship (under Rule 5, Sec. 100, delivery at a particular place) and that the defendant's right to inspect and his refusal to accept delivery after inspection, prevented the delivery at the ship and the passage of title.

In the absence of anything in the contract showing a different intention, inspection and acceptance is not a condition precedent to title passing, if the goods were specific at the time of the bargain, or if the buyer had assented to some other act of the seller than delivery as an act of appropriation or had assented to the seller's act of delivering the goods to some third person as an act of appropriation.

Nor is inspection and acceptance a condition precedent to title passing in f. o. b. point of shipment contracts, by a clause reserving to the buyer the right to inspect the goods upon arrival, *Standard Casing Co. vs. California Casing Co.*, 233 N. Y. 413. The words "allow inspection" stamped on a bill of lading or a clause in the contract of sale reserving to the buyer the right to inspect the goods upon arrival are to be construed as avoiding the effect of Subd. 3, Sec. 128, Pers. Prop. Law, so that the buyer shall have the right to inspect the goods before paying the draft in order to satisfy him-

self that they are in fact as ordered, but such clauses do not have the effect of postponing the passing of title until then.

§ 186. **Right of Inspection as a Condition Precedent to Paying the Price After Title Has Passed.** In cases where the title has passed before delivery to the buyer—as where the goods were specific at the time of the bargain, or where the contract called for shipment of unascertained goods by a carrier in accordance with an order or contract the buyer paying the freight—has the buyer the right to inspect the goods before paying the price? Subd. 3, Sec. 128, Pers. Prop. Law, provides as follows: “Where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words ‘collect on delivery,’ or otherwise, the buyer is not entitled to examine the goods before payment of the price in the absence of agreement permitting such examination.”

It should be observed that Subd. 3, Sec. 128, does not apply to every shipment by a carrier but only to such shipments where the terms of the contract provide that the carrier shall collect on delivery. Hence, where the carrier may deliver the goods to the buyer without collecting the price from him, the buyer has the right to inspect the goods before taking delivery. But this right of inspection will not be a condition precedent to title passing, it will operate only as a condition precedent to paying the price.

Where goods are shipped by the seller to the buyer through a carrier “collect on delivery,” the buyer has no right to inspect the goods before taking delivery; but where the seller directly delivers the goods to the buyer “collect on delivery” the provisions of Subd. 3, Sec. 128, do not apply, and the buyer has the right to inspect before taking delivery; and in such a case his right of inspection is a condition precedent to title passing, even if the goods were specific, because the transaction is a “cash” sale, and the parties did not intend title to pass until payment on delivery.

Where there is an agreement for payment of the price by sight draft with the bill of lading attached, payment is a condition precedent to delivery and hence, inconsistent with the right of inspection, *Plumb vs. Hallauer*, 145 App. Div. 20. In such a case the buyer is not entitled to an inspection

of the property before paying the draft, and he cannot refuse to accept the property because such inspection is refused. *Whitney vs. McLean*, 4 App. Div. 449.

Where the terms of the sale of goods under a written contract are "net cash against delivery order," the buyer has no right to an inspection of the goods before payment. By such an agreement he has waived any right to examine the goods, *Brown vs. Raritan Chemical Works*, 188 App. Div. 578.

As a general rule the place of inspection is the place of delivery and the buyer has no right to demand an inspection elsewhere. *Anderson Trading Co. vs. Brody*, 193 App. Div. 681; *Motley vs. Elmenhorst*, 142 App. Div. 830.

The expenses of the inspection must be borne by the buyer, *Lifshitz vs. McConnell*, 80 App. Div. 289.

The buyer may use a reasonable quantity of the goods to test them, even though the goods tested be thus destroyed, if the nature of the goods requires such a test, *Gerli vs. Silk Mills*, 80 N. Y. L. 128.

§ 187. **Right of Inspection as a Condition Subsequent to Title Passing.** Where, by the terms of the contract, the seller is required to ship the goods to the buyer through a carrier, the title, as a general rule, passes to the buyer upon shipment, Subd. 2, Rule 4, Sec. 100, unless the seller is to pay the freight, Rule 5, Sec. 100, and title passes even though the buyer has had no opportunity to inspect the goods. But in such a case the buyer has the right, within a reasonable time after the goods have arrived, to examine them in order to see if they are in conformity with the contract or order, and if he discovers they are not, then upon giving prompt notice to the seller of that fact, he may revest title in the seller.

In *Glass & Co. vs. Misroch*, 239 N. Y. 475, Cardozo, J., said in reference to the general rule that title to the goods passes to the buyer upon shipment: "This does not mean that the buyer is helpless if the goods are found to be defective. He has a right to examine and reject thereafter, but this right is a condition subsequent to title passing and not a condition precedent to title passing." It is "a right to see them in order to determine, before making payment, whether he has already become owner because of authority previously given the seller." *Williston on Sales*, Sec. 474.

When the seller has shipped goods not in conformity with the contract, one of two results conceivably follow: (1)

title passes upon shipment with the right in the buyer to re-vest title in the seller upon discovering the non-conformity in an inspection made within a reasonable time after the goods have arrived, in which case risk of loss during transit rested upon the buyer; or (2) title does not pass upon shipment because the seller has not acted in conformity with the authority given to him by the buyer and risk of loss during transit rested upon the seller.

Although Judge Cardozo has said that the buyer's "assent to the appropriation of goods in a deliverable state is not assent to the appropriation of any goods, though of a kind, or a quality at variance with the contract" (*Glass & Co. vs. Misroch*, 239 N. Y. 475, 480), he also said in the same case "a right survives to examine and reject thereafter, but it survives as a condition subsequent. When we speak of the condition as subsequent, we mean that assent to the appropriation stands, unless revoked for sufficient cause." It would, therefore, appear that the Court of Appeals leans to the view that even though the goods shipped are not as ordered, title passes upon shipment under Rule 4, Subd. 2, Sec. 100, but subject to the right in the buyer to inspect the goods within a reasonable time after arrival, and if upon such inspection he discovers that they do not conform to the contract or order, to re-vest title in the seller. It is only where the goods did not conform to the contract that the buyer will want to re-vest title in the seller. If it followed from a shipment of goods not in conformity with the contract, that title did not pass upon shipment, there is no title in the buyer to re-vest in the seller and nothing on which a condition subsequent could operate. Therefore, since the Court of Appeals takes the view that "a right survives to examine and reject thereafter, but it survives as a condition subsequent," it must necessarily take the view that title passes upon shipment, even to goods shipped which were not in conformity with the contract.

This view does not seem to be shared by Williston, who says in *Sales*, Sec. 473, "It is often said without due reflection that when goods are shipped in attempted fulfillment of an order or contract, that if the goods are not of the specified quality, the property passes to the buyer on delivery of the goods to the carrier, but that the buyer, on examining them, may rescind the sale. This, however, seems inaccurate. The seller is authorized to appropriate to the buyer only such goods as the offer or contract indicates."

The serious result of the view that title passes upon

shipment, even if the goods are not as ordered, subject to the right in the buyer to revest title in the seller—and the result most likely to prove a hardship to the buyer, is that risk of loss rests on the buyer from the moment the goods are shipped until the moment he decides to revest title in the seller, after inspecting the goods upon arrival. Of course, if the goods arrive safely, the risk of loss has proved of no consequence to the buyer. And if there is a partial loss or damage to the goods which still leaves it possible to the buyer to prove that the goods shipped were not as ordered, the risk of loss is of no consequence to the buyer, because he is then in a position to prove that the title never passed to him because the seller in shipping the goods did not act within the authority the buyer had given him. It is only where the goods are totally lost or entirely destroyed in transit, so that the buyer is unable to prove that they were not in conformity with contract, that the risk of loss will prove a serious hardship on the buyer, if the goods in fact were not as ordered.

In cases of this kind, if the goods are lost or destroyed, and the buyer is resisting an action for the price, the burden rests on him of proving that the goods shipped were not as ordered. If he cannot prove this, he will have to pay the price under Subd. 3, Sec. 103, Pers. Prop. Law, even if it be the fact that the goods shipped were not as ordered.

In *Glanzer vs. Armsby*, 100 Misc. 476, beans sold f. o. b. had been delivered to the carrier and the title had passed. While in transit they were confiscated and destroyed by the U. S. Government because they were buggy. The buyer sued for a refund of the purchase price. It was held that he could not recover, unless he proved that the goods delivered to the carrier were not in accordance with the contract, as the burden was on him to show failure of consideration for the payment made.

In *Liebovitz vs. Rosenberg Co.*, 213 App. Div. 143, title to the goods had passed to the buyer and payment had been made. After inspection the buyer rejected the goods and notified the seller thereof. It was held that the payments made could be recovered in an action for money had and received, the buyer proving that the goods delivered did not comply with the contract.

In *Delaware R. R. Co. vs. U. S.*, 231 U. S. 363, hay was sold and delivered to the railroad company as buyer. The delivery was to be made at Buffalo with privilege to the buyer to transport to other places and there inspect. It was

held that the title passed subject to the right of rescission, if defects were subsequently discovered. Such delivery gave sufficient title to maintain an action for the price, and the title would stand unless it appeared that there was a valid ground for the rejection of the goods.

In Jensen on Sales, Sec. 249, it is said: "If the seller tenders goods for delivery (Rule 5), and after inspection the buyer refuses to take them, thereby preventing the title from passing, the seller's action is for wrongful refusal to accept. In order to recover, he must, of course, prove as a condition precedent that the goods tendered were goods as described in the contract. Where, however, the seller with the assent of the buyer has appropriated the goods to the contract, and delivered them to the carrier for transmission to the buyer, the title passes. Under such circumstances, the buyer becomes liable for the price (Pers. Prop. Law, Sec. 144), no matter whether he takes or refuses to take the goods. The seller, in his action for the price, need only allege and prove facts showing that the title has passed, and it becomes a matter of defense for the buyer to show that the goods were not of the kind or quality contracted for."

For a further discussion of this subject, see Sec. 111 *supra*.

When it is said that the right of inspection operates as a condition subsequent, it confers the right on the buyer to return goods of which he has already become owner, *only* in case they in fact did not conform to the contract, and to recover money which he has already paid. Where by the terms of the contract the title was to pass before delivery to the buyer, "the buyer has a reasonable time after the delivery in which to examine the goods, and if they are not of a kind and quality ordered, he may then refuse to accept them, and thereby rescind the contract; but this right does not prevent the title from passing nor a recovery by the seller in an action for goods sold and delivered, if in fact they do conform to the terms of the contract." Williston on Sales, Sec. 473.

§ 188. **What Amounts to a Revesting of Title in Seller.** Where, after title had passed, but the buyer refused to accept the goods from the carrier, whereupon the seller took them back and mingled them with his own stock, it was held that it amounted to a revesting of the title in the seller and that he could not thereafter sue for the price. His action was for damages for the purchaser's wrongful refusal to ac-

cept, *Dunlop's Sons, Inc. vs. Alpern*, 214 App. Div. 339. And where the seller after title had passed permitted the buyer to return a part of the goods, which were lost by the carrier in returning them to the seller, it was held that title to the goods so lost had revested in the seller, and the seller's claim was not against the purchaser but against the carrier which was acting as agent of the seller in returning them, *Dube vs. Liberty Co.*, 153 N. Y. S. 577. Resale by the seller after buyer's offer to return defective goods will amount to a revesting of title in the seller so that the buyer may recover a part payment, *Schmid vs. Klinck Co.*, 189 N. Y. S. 534.

CHAPTER XVII.

OBLIGATIONS OF SELLER AS TO DELIVERY AND
OF BUYER AS TO PAYMENT

§ 189. **Scope of Chapter.** In a previous chapter (chapter VIII, *supra*), the subject of "delivery" was discussed from the standpoint of what delivery was necessary to pass title from the seller to the buyer. In the present chapter, the title may have been transferred prior to the delivery, and we shall be interested only in what delivery is necessary to put the buyer in default on the contract.

§ 190. **In the Absence of Any Provisions in the Contract to the Contrary, Delivery and Payment Are to Take Place at the Same Time.** "Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods." Sec. 123, Pers. Prop. Law.

Where the contract is silent as to the time of payment, payment becomes due on delivery of the goods, *Frost Co. vs. Atlantic Co.*, 174 N. Y. S. 15.

Where the goods are to be delivered at the seller's place of business, and the contract is silent as to the time of payment, the buyer must call for them and tender the price at the same time before he can put the seller in default, *Lueders vs. Fahlberg*, 150 N. Y. S. 635.

§ 191. **In Cash Sale, Buyer Must Pay on Delivery.** As hereinbefore pointed out (Sec. 8 *supra*), delivery and payment are concurrent conditions. The seller does not intend that the buyer shall have either possession or title until he pays. Hence, even though the goods were specific at the time of the bargain, so that no further act of appropriation is necessary, title does not pass to the buyer and he is not liable for the price until the goods are delivered.

§ 192. **In C. O. D. Sales Buyer Must Pay on Delivery Without First Inspecting the Goods.** "Where goods are delivered to a carrier by the seller, in accordance with an or-

der from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words 'collect on delivery' or otherwise, the buyer is not entitled to examine the goods before payment of the price in the absence of agreement permitting such examination." Subd. 3, Sec. 128, Pers. Prop. Law.

§ 193. Where Goods Are to Be Delivered to the Buyer Personally and Not Through a Carrier, He Is Not Liable for the Price Until He Has Inspected and Accepted the Goods. Where the contract requires the seller to deliver unascertained goods to the buyer personally and not through a carrier and there has been no prior act of appropriation assented by the buyer, the buyer is not liable for the price until he accepts delivery. He may refuse delivery for any or no reason and not be liable for the price, although he may be liable for damages for breach of contract.

§ 194. Where Unascertained Goods Are to Be Shipped to the Buyer Through a Carrier F. O. B. Point of Shipment, the Buyer Becomes Liable for the Price Upon Shipment, no Matter in What Form the Bill of Lading Is Taken, Unless a Contrary Intention Appears. The buyer may be liable for the price upon refusing to accept a tender of a bill of lading to seller's order in a sale F. O. B. point of shipment, *Rosenberg & Co., vs. Buffum Co.*, 234 N. Y. 338. The buyer may be liable for the price before he has inspected the goods where the goods are shipped through a carrier, Sec. 128, Subd. 3.

§ 195. In C. I. F. Sale Buyer Must Pay Price on Receipt of Documents Before Goods Arrive. Under a contract requiring \$16,000 worth of goods to be imported from Java, "net spot cash on delivery of documents" does not mean that the buyer is required to have the cash in his possession ready to make payment at any moment when the documents are presented. The law allows him a reasonable time to procure the money and make the payment, *Strasbourg vs. Leerburger*, 233 N. Y. 55.

§ 196. Where Bill of Lading With Sight Draft Attached Is Sent to Buyer, He Must Pay Draft Before Dealing with Bill of Lading or Goods. Where the buyer receives together with the bill of lading a draft for the price, he is charged with knowledge that the bill of lading is sent upon

the condition that the draft be paid and if he accepts the condition, he becomes liable to the seller, if he deals with the bill of lading or goods without honoring the draft.

§ 197. **Place of Delivery.** As a general rule, in the absence of any provision in the contract to the contrary, the place of delivery is the seller's place of business or residence, and the seller is under no duty to deliver the goods sold to the buyer's place of business or residence, Sec. 124, Pers. Prop. Law; but if the goods at the time the contract of sale was made, were to the knowledge of the parties in some other place than the seller's place, then that place is the place of delivery, Subd. 1, Sec. 124, Pers. Prop. Law.

When the contract mentions no place of delivery, the place of delivery is the seller's place of business. Therefore, if the buyer fails to call for the goods, he cannot sue the seller for default in delivery, *Geo. Gueders Co. vs. Fahlberg*, 150 N. Y. S. 635. If the place of delivery was the seller's place of business, but the seller of his own volition undertakes to transport them to the buyer, he has to make tender of delivery at the buyer's residence or place of business before title can pass. *Brooks vs. Kaempfer*, 163 N. Y. S. 1077.

§ 198. **Place of Delivery in F. O. B. Contracts.** If the contract is f. o. b. point of shipment, the place of delivery is at the railroad freight station at point of shipment, if less than a carload lot is to be shipped, but if one or more carload lots are to be shipped, the place of delivery is at the cars.

Where a contract provided that delivery was to be made "at New York, when called for, f. o. b. New York," and both parties had their place of business in New York, it was held that under a reasonable interpretation of the contract, the buyer had the option to designate the place of delivery within the City of New York, whether to himself or to a carrier for transportation elsewhere; that the provision "f. o. b. New York" would be meaningless, unless the seller was to do the carting either to the buyer's place of business or to some other place designated by the buyer; and that the words "when called for" compelled the seller to hold the goods for a reasonable time until the buyer indicated the time and place of delivery, and did not mean that the buyer was to call for the goods at the seller's place of business. If the buyer failed to indicate within a reasonable time or within the time expressly set for delivery, the place where the goods

were to be delivered, the seller could put the buyer in default by tendering delivery at the buyer's place of business. *Liondale Co. vs. Gerber*, 197 App. Div. 345.

Where the contract was silent as to the place of delivery, but contained the terms "f. o. b. Solvay, N. Y.," it was held that the place of delivery was at the seller's factory at Solvay, and that it was under no obligation to deliver the goods at the buyer's place of business. *Miller & Sons vs. Sergeant*, 191 App. Div. 814.

Where a contract for the sale of apple trees provided for delivery f. o. b. cars at Dansville, it was held that there was no performance by the seller until he had placed the trees on the cars. *Vogt vs. Chase Co.*, 235 N. Y. 208.

§ 199. Place of Delivery Under a C. I. F. Contract. Where the contract provides for shipment from a foreign country to New York and the price is quoted c. i. f. New York, the term "c. i. f. New York" relates merely to the price and has no bearing on the place of delivery. *Mee vs. McNider*, 109 N. Y. 500; *Seaver vs. Lindsay*, 111 Misc. 533, aff'd 233 N. Y. 273. Accordingly, in a straight c. i. f. contract the place of delivery is the steamship pier on wharf in the port from which the goods are to be shipped. *Smith vs. Moscahlades*, 193 App. Div. 126. But in a modified c. i. f. contract, as for example where the price is not to be paid except on presentation of delivery order on arrival of the goods, the place of delivery is the steamship dock at the port of destination. Where a contract for the sale of straw braid to be imported from Japan was made in New York where both parties had their place of business and the price was quoted c. i. f. New York and the seller consigned the goods to himself in New York, insured them in his own name and placed them in a warehouse in New York in his own name and took receipts in his own name, it was held that the place of delivery was at the seller's office in New York. *Schopflocker vs. Essgee Co.*, 197 App. Div. 781.

§ 200. Delivery of Greater Quantity than Contract Called For. If the seller delivers to the buyer a quantity of goods greater than he contracted to sell, he has not performed his obligation. The buyer, therefore, may reject *all* the goods so delivered, or he may accept the goods included in the contract and reject the rest. Subd. 2, Sec. 125, Pers. Prop. Law.

The Court of Appeals has refused to apply Sec. 125 literally in so far as it provides that the buyer may reject the

entire shipment, when the seller delivers a quantity greater than contracted for, and has held that where the excess delivered is so slight that it cannot possibly put the buyer to any trouble or expense, he is not entitled to reject the whole shipment, *Mutual Chemical Co. vs. Hastings Co.*, 235 N. Y. 145.

§ 201. **If Buyer Retains Greater Quantity Delivered Than Ordered, He Must Pay for It at Contract Rate.** If the buyer accepts the whole of the goods so delivered, he must pay for them at the contract rate. Subd. 2, Sec. 125, Pers. Prop. Law.

§ 202. **Delivery of Less Quantity Than Contract Called For.** If the seller delivers to the buyer a quantity of goods less than he contracted to sell, he has not performed his obligation. The buyer, therefore, may reject the goods so delivered. Subd. 1, Sec. 125, Pers. Prop. Law.

A contract to deliver 50,000 to 55,000 yards is performed by furnishing the minimum quantity, *Salembier Co. vs. North Adams Co.*, 178 N. Y. S. 607.

A contract providing for the sale of about 10,000 bags of coffee, delivery to be made within 5% more or less of quantity sold, is fulfilled by delivering 9,500 bags, *Grace & Co. vs. Maes & Co.*, 192 App. Div. 611.

Where a contract called for tons and not for long tons, it will be presumed that tons weighing 2,000 pounds each are meant, *Chemung Iron Co. vs. Mersereau Co.*, 179 N. Y. S. 577.

§ 203. **Buyer's Liability to Pay Where He Accepts and Retains a Lesser Quantity Delivered Than Ordered.** But if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received. Subd. 1, Sec. 125, Pers. Prop. Law; *Dancey-Davis Press, Inc. vs. American Fashion Co.*, 120 Misc. 157.

The words "used or disposed of" in Subd. 1, Sec. 125, Pers. Prop. Law, contemplate a situation in which the buyer cannot return the goods. Hence where the buyer, relying on the seller's future performance, accepts a partial delivery

and sells some of the goods, he may return those unsold. *Kirshman vs. Crawford Co.*, 165 App. Div. 259.

§ 204. **Partial Delivery Under an Entire Contract Not Calling for Instalment Deliveries.** A buyer is not bound to accept a partial delivery under an entire contract, *Kirsh & Co. vs. Roulston*, 178 N. Y. S. 246.

The provisions of Sec. 125 apply to an entire contract not calling for instalment deliveries. In an ordinary contract for the purchase and sale of goods, the buyer is not bound to receive delivery of the goods in instalments. He is entitled to delivery of all the goods at the same time, and is bound to receive delivery of all at the same time. And a buyer has no right to pay the price in instalments.

If the contract does not expressly provide for instalment deliveries, nor can it be inferred from the language used or other circumstances that the seller had the right to deliver in instalments, the acceptance by the buyer of an instalment is a waiver by him of any objection that the goods were not delivered at one time. *Benjamin on Sales*, 6th Ed., p. 835.

§ 205. **Delivery of Goods Part of Which Conform to the Contract and Part of Which Do Not.** The seller does not perform his obligation unless all of the goods he delivered conform to the contract, but where a contract is in its nature divisible and some of the merchandise tendered is according to the contract and part of it is not, the buyer may accept that part which is according to the contract, pay for it at the contract price, and reject the balance of the shipment. *Portfolio vs. Rubin*, 233 N. Y. 439.

Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description, not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole. Subd. 3, Sec. 125, Pers. Prop. Law.

Where the contract requires that each piece of goods shall contain 60 yards, a tender of pieces of goods containing 53 yards and less is insufficient. Under Sec. 125, Pers. Prop. Law, quantity is always of the essence of a sales contract, and the seller is bound to tender the amount contracted for in order to hold the buyer for performance. *Beals vs. Hirsch*, 214 App. Div. 86.

§ 206. **Seller May Correct Defective Delivery Within**

Contract Time. Where there has been a defective delivery or tender of goods and where the position of the buyer has not been altered by reason of the defective delivery, the seller may within the contract period rectify his mistake and make delivery of the goods covered by the contract. *Lowinson vs. Newman*, 201 App. Div. 266.

§ 207. **Time of Delivery.** Where by a contract to sell or a sale, the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time. Subd. 2, Sec. 124, Pers. Prop. Law.

Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact. Subd. 4, Sec. 124, Pers. Prop. Law.

Where the order was to ship "at once" shipment within two days was held to be timely in *Levy vs. Dettra*, 154, N. Y. S. 176; but a delivery after seven weeks was held to be insufficient where the contract required delivery "at once." *Tilton vs. Schwarz*, 199 App. Div. 607.

Where the contract required delivery at the seller's place of business on or about October 15th and the seller was to notify the buyer, notice given by the seller to the buyer on November 5th that the goods were ready for him was held to be within a reasonable time. *Schiff vs. Winton Co.*, 153 N. Y. S. 961.

Where the contract requires shipment in October, the buyer is not bound to accept a shipment made in September, *Winter vs. Kohn*, 212 App. Div. 391. And where the contract calls for November shipment, the buyer is not bound to accept one on October 28th, *Goldenberg vs. Cutler*, 189 App. Div. 489. But a contract to ship not later than October 1st is not violated by shipping the goods on September 13th, where time is not of essence and the purchaser is not prejudiced by the earlier shipment, *Atlas Shoe Co. vs. Lewis*, 202 App. Div. 244.

Where an entire contract calls for delivery August, September, October, and there is no provision for instalment deliveries, it will be construed to mean that the seller has the option to deliver the goods at any time during the three months mentioned. *Bahnsen vs. Leaf*, 203 App. Div. 618.

Where the contract provides for delivery July-August, seller's option, the buyer is justified in cancelling the con-

tract on September 1st, the seller having made no shipment as late as August 31st. *General Commercial Co. vs. Butterworth*, 198 App. Div. 799.

Where an entire contract provides for delivery June, July, August, it will be construed to mean that the seller has until the last day of the last month named in which to make delivery. *Briton vs. Ferrin*, 171 N. Y. 235.

Where the contract provides for September-October shipment, it is construed to mean that the goods may be delivered to the steamship line on any day during the specified months for transportation and the seller is not bound to see to it that the goods are actually on board. *Childs vs. Hirsh*, 202 N. Y. S. 226.

Under an instalment contract, deliveries were to be made in July, August, September, and October. It was held that shipment of the July instalment any time in July was sufficient, even though it was not received by the buyer in the month of July. *Jauch vs. Powertown Corp.*, 212 App. Div. 326.

Where the contract requires "Prompt delivery" and there is evidence that prompt delivery in that trade means shipment within 15 to 30 days, the question whether or not there was a compliance with the contract is for the jury. *Carson vs. Balboa Co.*, 120 Misc. 389.

Where a contract of sale provides for shipment by a certain day, it is construed to mean delivery of the goods to the carrier on or before that day, and not that the carrier shall have actually begun to forward the goods by that day. In the case of *Ledon vs. Havemeyer*, 121 N. Y. 179, where the contract provided for the shipment of the merchandise brought from a port in Cuba within thirty days, it was held that the vendor complied with the contract and had made a sufficient delivery when he loaded the merchandise on a vessel within thirty days, although the vessel was detained several days thereafter by the charterer awaiting freight to fill out her cargo, but without the knowledge or consent of the vendor.

"Whether time in a given case is so vital that a breach of the contract in point of time is a sufficiently substantial or material default to go to the essence of the contract is a question of fact. Time is generally said to be of the essence in mercantile contracts. The decisions, however, do not warrant the conclusion that in an installment contract, the slightest default in time in regard to any installment is fatal,

but any considerable delay in delivering or accepting the goods generally would be." Williston on Sales, Sec. 467e.

§ 208. **When May the Seller Deliver the Goods by Instalments.** He may do so when the contract expressly provides for deliveries in instalments, or "an instalment contract may be implied from the terms of the contract, or may be inferred from the circumstances. Thus, for example, it is implied when the goods are deliverable 'as required' or on similar terms. Where also there is a contract for a quantity of goods some of which are existing, while others are to be manufactured, and no particular time is specified for delivery, the inference is that the goods are to be delivered by instalments." Benjamin on Sales, 6th Ed. p. 835.

§ 209. **Distinction Between "Entire" and "Divisible" Contracts.** By agreement either the goods may be deliverable in instalments, or the price payable in instalments. But this does not create a divisible or severable contract. "The essential feature of such a contract is that a portion of the price is by the terms of the agreement set off against a portion of the performance and made payable for that portion, so that when part of the performance has been rendered a debt for that part immediately arises, which is recoverable in spite of subsequent breach of contract by the seller." Williston on Sales, Sec. 466.

Even though by the terms of the contract, the price for a portion of the goods can be readily calculated, the contract is an entire contract and no part of the price is payable until all of the goods have been received. It is only where the price for a part can be calculated and there is expressly or impliedly a promise to pay for a part, even though all of the goods are not delivered, that the contract is divisible or severable; e. g. a contract for the sale of a bill of goods at certain prices for each article. In such a case the seller may recover the price for the portion delivered, less damages for non-delivery of the rest. But if payment of a lump sum is to be made for several articles, the contract is entire and not divisible.

"If, however, it appears by express terms or by necessary implications from the terms of a contract that the intention of the parties was to make payment of the consideration depend upon delivery of all the articles, the contract will be held entire, though the consideration may be measured in units and be actually severable." Williston on Sales, Sec. 466a.

"The difficulty of determining whether a contract is divisible or not arises chiefly when the contract specifies a rate of payment at so much a pound or a foot or a month, but does not in terms state whether any payment shall be made before full performance has been rendered. The governing principle is the manifested intention of the parties in view of the nature of the contract and the usages of business—that is, their intention to have performance of a part on one side the price or exchange of a corresponding part on the other." Williston on Sales, Sec. 466b.

§ 210. **Rights of the Parties Where Seller Makes Defective Deliveries in Respect of One or More Instalments, or the Buyer Neglects or Refuses to Take Delivery of or Pay for One or More Instalments.** Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments. Subd. 1, Sec. 126, Pers. Prop. Law.

Where there is a contract to sell goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken." Subd. 2, Sec. 126, Pers. Prop. Law.

The effect of Sec. 126 has been well summarized by the Court of Appeals in *Helgar vs. Warner's Features, Inc.*, 222 N. Y. 229, as follows: "We have departed from the English Statute which keeps the contract alive unless the breach is equivalent to repudiation. We have established a new test, which weighs the effect of the default, and adjusts the rigor of the remedy to the gravity of the wrong. 'It depends in each case on the terms of the contract and the circumstances of the case' whether the breach is 'so material' as to affect the contract as a whole.

"The answer to that question must vary with the facts. Default in respect of one installment, though falling short of repudiation, may under some conditions be so material that there should be an end to the obligation to keep the contract alive. Under other conditions, the default may

be nothing but a technical omission to observe the letter of a promise. General statements abound that, at law, time is always of the essence. For some purposes this is still true. The vendor who fails to receive payment of an installment the very day that it is due, may sue at once for the price. But it does not follow that he may be equally precipitate in his election to declare the contract at an end. That depends upon the question whether the default is so substantial and important as in truth and in fairness to defeat the essential purpose of the parties. Whatever the rule may once have been, this is the test that is now prescribed by statute. The failure to make punctual payment may be material or trivial according to the circumstances. We must know the cause of the default, the length of the delay, the needs of vendor, and the expectations of the vendee. If the default is the result of accident or misfortune, if there is a reasonable assurance that it will be promptly repaired, and if immediate payment is not necessary to enable the vendor to proceed with performance, there may be one conclusion. If the breach is willful, if there is no just ground to look for prompt reparation, if the delay has been substantial, or if the needs of the vendor are urgent, so that continued performance is imperiled, in these and in other circumstances, there may be another conclusion. Sometimes the conclusion will follow from all the circumstances as an inference of law to be drawn by the judge; sometimes, as an inference of fact to be drawn by the jury."

Under Subd. 2, Sec. 126, a defective installment delivery does not give the buyer an absolute right to rescind the contract. It depends in each case upon the circumstances, and when the testimony is conflicting, the question is for the jury. *Jauch vs. Powertown Corp.*, 212 App. Div. 326.

Where the seller makes installment deliveries of defective goods, the buyer may reject them and recover damages as to those instalments that he had used before discovering the defect. *Baxter vs. Savoy Shirt Co.*, 238 N. Y. 106.

A buyer need not accept overdue instalments, *Herx vs. Carlson*, 210 App. Div. 417. But acceptance by the buyer of an overdue installment is a waiver by him of my objection that the goods were not delivered on time.

Where the seller has refused to proceed with the contract on the ground that the buyer had failed to pay for installments due, the mere fact that the buyer thereupon paid for the overdue installments, and the seller accepted

the payment, does not prevent the seller from relying on the buyer's breach as an excuse for the proceeding with the deliveries, provided the breach is a material one. *Rosenthal vs. Brilliant Silk Co.*, 217 App. Div. 667.

In *Marrone vs. Engle*, 171 N. Y. S. 47, it was held that where the buyer continually delayed in instalment payments, there was such a breach as to justify the seller in refusing to make further deliveries. Where the buyer wilfully and inexcusably failed to pay one instalment, it was held that the seller was justified in cancelling the contract. *Ferguson vs. Church*, 236 N. Y. 149. But where the buyer's default in an instalment payment is accidental, and there is reasonable assurance that it will be promptly paid, and immediate payment is not necessary to enable the seller to proceed, the latter may not be justified in cancelling the contract. *Helgar Corp. vs. Warner Features, Inc.*, 222 N. Y. 449.

Under a contract calling for deliveries in installments, the buyer may waive the condition of a contract and accept instalments of a size of goods not contracted for. But by so doing, he does not relinquish his right to insist that the subsequent instalments must be of the proper size. *Foster Co. vs. Fox*, 124 Misc. 740, modified in 215 App. Div. 433.

The buyer need not receive a smaller or a larger instalment than he bargained for; nor need he receive goods of a different kind, or of defective quality. *Williston on Sales*, Sec. 467. As the buyer's assent to take the earlier instalments was based on the justifiable belief that the latter instalments would also be delivered, he should be allowed to rescind the contract and recover any portion of the price which he may have paid, if he can return the goods which he has received. *Williston on Sales*, Sec. 467. If either buyer or seller has committed a material breach of contract, or has by repudiation manifested an intention to commit such a breach, the other party should be excused from the obligation to perform further. If, however, the injured party knowingly accepts defective performance of the contract, or accepts further performance after he is aware that a breach of contract has been committed, such conduct will operate as an election to go on with the contract, though it will not necessarily destroy his right to recover damages for the breach committed by the other party. *Williston on Sales*, Sec. 467.

Where the seller has delivered one or more instalments of goods inferior in quality to what the contract calls for, even though he does not manifest an intent to persist in

sending inferior goods, if he has already a great quantity of inferior goods, the inevitable consequence is that he will not substantially perform the contract even though all the remaining instalments are what the contract calls for. The buyer, should, therefore, be allowed to refuse to go on with the contract, unless he has manifested an election to continue by knowingly and voluntarily accepting inferior goods, or otherwise. Williston on Sales, Sec. 467d.

§ 211. **Buyer's Waiver of Seller's Faulty Delivery.** Where the seller has not performed his obligations as to delivery in accordance with the provisions of the contract, the buyer, by his conduct thereafter with knowledge of the seller's default may waive the non-performance by the seller as an excuse for his own performance. Thus where the buyer demands delivery after the contract time, he thereby waives the seller's previous default (*Brenner vs. Greenberg*, 183 N. Y. S. 22); acceptance of the goods after the contract time shows the buyer's waiver of the delay) (*Sarachen vs. Wilson*, 207 App. Div. 768; *Robinson vs. Thatcher*, 150 N. Y. S. 658; *Patterson vs. Meyerhofer*, 204 N. Y. 96).

Ordinarily acceptance of the goods by the buyer after the expiration of the contract time, does not bar his action for damages for delay, (*Crocker vs. Varick Co.*, 104 App. Div. 568. But where the buyer has cancelled his order by reason of delay and thereafter withdraws his cancellation and expresses his satisfaction to accept a delayed delivery, the acceptance of the goods justifies a finding of waiver of his damages. *Rice Co. vs. Hoffman Mills*, 158 App. Div. 309. If after the seller has failed to deliver within the contract time, the buyer requests delivery, he thereby precludes himself from rescinding the contract for failure to deliver in time, but he does not waive his right to claim damages for the delay. *Bailey vs. Elm City Lumber Co.*, 167 App. Div. 42.

If a buyer retains delayed shipments without complaint, he waives his right to damages for the delay, (*Mason vs. Valentine Co.*, 180 App. Div. 823.

The buyer's payment for partial delivery is not a waiver of his claim for damages for non-delivery of the balance, (*Goldstein & Co. vs. Royal Works*, 181 N. Y. S. 763.

In *Goodyear Tire Co. vs. Vulcanized Products Co.*, 228 N. Y. 118, it was said that a buyer who accepts, retains, and uses a partial delivery of goods due in a single delivery, may be held for the purchase price thereof, and on the other hand may obtain relief against the seller for damages caused

by delay and default in proper delivery of the balance of the goods.

Where the buyer accepts a part of an entire order knowing that the seller does not intend to perform, he must pay at the contract rate, *Gutman vs. Fligel*, 181 N. Y. S. 40. Where, under an entire contract, not providing for instalment deliveries, the buyer accepts a partial delivery, he is presumed, in the absence of any evidence as to the contrary to know that the seller does not intend to fully perform, and he must pay for the partial delivery at the contract rate. *Klein-Messner vs. Fair Waist Co.*, 217 App. Div. 647.

Where under an entire contract, not providing for instalment deliveries a portion of boxes ordered were delivered without fillers, and the buyer demanded delivery of the fillers for that portion and accepted delivery thereof, it was held that his conduct showed that he intended to retain and pay for the boxes and fillers delivered, although the seller failed to deliver the balance of the order. *Weinberg vs. Gash*, 94 Misc. 303.

Although the buyer, under a divisible contract, has accepted a part delivery, he may reject the balance on the ground that they were of inferior quality, *Commercial Ribbon Co. vs. Elbee Co.*, 193 N. Y. S. 510.

After there has been a waiver of delay in delivery, the delay can never be used as a defense, although it may, under certain circumstances, be availed of as a counterclaim. *Bridges Co. vs. Barry*, 237 N. Y. 281.

§ 212. **Buyer Is Not Bound to Return Goods Wrongfully Delivered.** Sec. 131, Pers. Prop. Law, provides: "Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them."

§ 213. **Delivery Must Conform With Contract As to Routing, Methods of Shipment, Instructions, Form of Bill of Lading, etc.** In the case of any sale, in order that there be a valid delivery, there must of course be a delivery in accordance with the provisions of the contract; for the seller does not comply with his duty unless the delivery tendered by him is one in accordance with the contractual terms governing the sale. *Harbison vs. Propper*, 112 Misc. 588. Accordingly the seller has not performed his obligation if he delivers the goods at a materially different time than the

contract called for; or by a different route, *Reynolds vs. Spencer*, 92 Hun. 275; or by a different method of shipment, *Hills vs. Lynch*, 3 Rob. 42 (N. Y. Syper. Ct.); or under a different kind of bill of lading; or at a different address.

In *Iasigi vs. Rosenstein*, 141 N. Y. 414, a contract provided for the shipment from Turkey of certain merchandise on a steamer to be named. The place of destination was New York. The name of the steamer leaving Turkey was later given and the merchandise was shipped on that vessel. The vessel proceeded to Liverpool, where the merchandise was transferred to another vessel bound for New York. Upon its arrival the buyer refused the merchandise upon the ground that there had been no proper delivery, as the vessel had not proceeded directly from Turkey to New York. The Court of Appeals held that since the contract provided only for shipment from Turkey and not from Turkey to New York, and since in fact it appeared that there was no steamer sailing directly from Turkey to New York, it must be held that the transshipment via Liverpool was a proper delivery.

Moreover, the seller must not only observe the express terms of the order or contract, but must also fulfill such obligations as the law imposes, irrespective of express bargain. Goods, therefore, must be packed in a reasonably careful manner, having in view the nature of the goods and the transit, or the property will not pass. *Williston on Sales*, Sec. 278.

Where the contract provided that the seller should ship in October-November at his option, and, if possible, recognize the routing named by the buyer, except that the seller should have the option of selecting the initial route, but the buyer neglected to fill out the blanks for destination, routing, and consignee, it was held that the buyer's neglect to send instructions did not nullify the contract, but left the seller free to ship the goods at the time specified to the buyer's place of business, no other place having been indicated. If the buyer had sent shipping instructions within a reasonable time, they might have been binding on the seller, but the seller was not bound to wait for them. *Rosenberg Co. vs. Buffum Co.*, 234 N. Y. 338.

§ 214. **Seller Must Make Proper Contract With Carrier for protection of Buyer.** Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circum-

stances of the case. If the seller omits so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages. Subd. 2, Sec. 127, Pers. Prop. Law.

Generally, the seller by the terms of the contract of carriage he makes with the carrier must preserve for the buyer a remedy against the carrier for failure to perform its common law duty. *Reid vs. Fargo*, 241 U. S. 544. The goods may be, however, of so dangerous or fragile a character that the carrier will not accept them without a contract limiting its liability. Under these circumstances, the shipper may be justified in making the shipment under a contract.

Where the seller upon delivering the goods to the carrier for transmission to the buyer declared their value to be only \$50 when they were of the value of \$95, and they were lost in transit, the seller must bear the loss, *Miller vs. Harvey*, 221 N. Y. 54; and the buyer is entitled to a refund of the price, *Lopez vs. Isaacs Inc.*, 210 App. Div. 601.

§ 215. **Seller's Duty to Insure the Goods for the Buyer During Transit.** It is not part of the seller's duty to insure the goods for the buyer during transit, *Bartlett vs. Jewett*, 98 Ind. 206, though by contract or even by custom such a duty may be imposed on him. But Subd. 3, Sec. 127, Pers. Prop. Law, provides: "Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows or ought to know that it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such transit."

§ 216. **Delivery Must Conform to Terms of Letter or Credit.** In the case of *Lamborn vs. Nat'l Bank of Commerce*, 48 Supreme Ct. Rep. 378, *Advance Sheets* of May 1, 1928, the plaintiff contracted to sell sugar to *Southgate & Co.* and the vendee provided a letter of credit, furnished by the defendant, against which the vendor was to draw drafts. The letter of credit provided that shipment of the merchandise purchased was to be made from Java by steamer to Philadelphia. The sugar was shipped from Java on a steamer originally not bound for Philadelphia but which was diverted to that port by its charterers while it was on the high seas. The sugar arrived at Philadelphia and was placed on board cars in accordance with the contract; drafts were then pre-

sented to the defendant, accompanied by proper documents, but payment was refused upon the ground that the merchandise had not been shipped on a steamer which had been continuously destined from Java to Philadelphia.

When a sales transaction involves a letter of credit upon which the vendor may draw, the letter having been accepted, becomes a part of the contract of sale and its terms are read into the sale agreement. The party entitled to draw against the letter of credit must therefore observe strictly its terms and conditions in order to hold liable the bank or other party issuing the letter. *Williams Ice Cream Co. vs. Chase Nat'l Bk*, 120 Misc. 301. Thus, where the letter of credit requires the vendor to present documents in a certain form, the bank is not liable on the letter of credit unless the documents are in the form provided. *Lamborn vs. Lake Shore Banking & Trust Co.*, 196 A. D. 504, aff'd 231 N. Y. 616. In the *Lamborn vs. Nat'l Bank of Commerce*, supra, the majority of the Supreme Court of the United States held that there had been a proper delivery of the merchandise, even though the vessel on which it was shipped had not at the commencement of its voyage sailed for Philadelphia. Mr. Justice Brandeis, who wrote the opinion of the majority of the Court, said: "The transaction is not like the ordinary contract for goods to be shipped. It is not like the common c. i. f. contract for shipment from a foreign to an American port, where delivery to the ship at the port of lading is delivery to the purchaser. Nor is it like those contracts where shipment is to be made by a named vessel. Here the contract was for the sale f. o. b. cars Philadelphia—and the buyer was not to acquire any interest in the sugar, legal or equitable, until so delivered."

A letter of credit, when once accepted, becomes part of the contract of sale, and its terms are read into the sale agreement. Where the letter of credit requires a straight bill of lading, the seller has not nullified his obligation by presenting an order bill of lading. *Lamborn vs. Lake Shore Banking Co.*, 196 App. Div. 504, aff'd 231 N. Y. 616.

§ 217. **Duty to Supply Cars for Transportation.** Under a contract of sale f. o. b. seller's mill, with no freight allowance, it is the buyer's duty to supply the cars at the seller's mill. *Braman vs. Briell Co.*, 120 Misc. 798.

§ 218. **Seller Performs His Obligation When He Delivers to Person at Buyer's Premises, Who Has Apparent Authority to Receive the Goods.** As to what constitutes de-

livery, possession must ordinarily be transferred to the buyer or his authorized agent, but the English Court has held that where under a contract the seller of goods is required to deliver them at the buyer's premises, he fulfills his obligation if he delivers them there to a person who apparently has authority to receive them, taking care to see that no unauthorized person receives them. *Galbraith and Grant, Ltd. vs. Block*, 1922 2 K. B. 155. If, therefore, the goods are received by an apparently respectable person, who has obtained access to the buyer's premises, and who signs for the goods in the buyer's absence and misappropriates them, the loss must fall on the buyer and not on the carrier or seller. *Williston on Sales*, Sec. 446.

§ 219. **Seller May Make Constructive Delivery Where Goods Are Bulky and in Possession of a Third Person.** Where no place of delivery is fixed by the terms of the contract, nor is there any evidence from which it may be found that the parties had otherwise agreed where the place of delivery should be—and no usage of trade is shown by which it may be inferred where the place of delivery should be—and it is not a sale of specific and ascertained goods known by the buyer to be at any particular place, the place of delivery is at the seller's place of business, under Subd. 1, Sec. 124, Pers. Prop. Law, unless constructive delivery elsewhere was permissible. "Where goods are bulky, a constructive delivery may be made at the place where the goods are stored (*Pollen vs. Le Roy*, 30 N. Y. 549; *Dunham vs. Pettee*, 8 N. Y. 508; *Wilkes vs. Ferris*, 5 Johns. 335; *Salmon vs. Brandmeier*, 104 App. Div. 66; *Bates vs. Conkling*, 10 Wend. 389)." *Rippey, J.*, in *Hubbard vs. Rockaway Lunch Co., Inc.*, 131 Misc. 53. But there cannot be a constructive delivery elsewhere until the goods have been appropriated to the contract with the assent of the buyer and until the warehouseman had given notice to the buyer that it would release the goods so appropriated to the buyer on the seller's order, and until the seller had executed and delivered to the buyer such an order.

When at the time of sale, the property is in the possession of a third person, title does not pass nor is delivery made until the third person acknowledges ownership in the buyer. The transfer of a non-negotiable warehouse receipt does not vest title to the property in the purchaser until the warehouseman acknowledges that it holds the property for the benefit of the purchaser, and until such time the risk

of loss as between the buyer and the seller is on the seller. *Cundill vs. Lewis*, 245 N. Y. 383.

§ 220. **Seller's Duty to Load Carload Lots.** If the goods sold and to be shipped will find one or more entire freight cars, it is the duty of the seller and not the duty of the railroad company to load the cars. But if less than carload lots are sold and shipped, then since railroads are bound to load the goods, the duty of the seller would be fulfilled by delivering them to the carrier at the proper railroad station. *Williston on Sales*, Sec. 280a.

§ 221. **Buyer Who Is Bound to Pay Cash Against Bill of Lading Is Entitled to Clean Bill of Lading.** A buyer who is bound to pay cash against bills of lading without previous opportunity or right of inspecting the goods, is clearly entitled to a clean bill of lading, i. e. one which does not indicate any defect in the goods. *Williston on Sales*, Sec. 405c.

§ 222. **Buyer May Be Liable for Price Upon Refusing to Accept a Tender of a Bill of Lading to the Seller's Order in a Sale F. O. B. Point of Shipment.** Although the effect of taking a bill of lading to his own order is to retain the legal title in himself—since, except for the form of the bill of lading, title would have passed to the buyer on shipment, the sale being f. o. b. point of shipment—and since risk of loss is on the buyer, Sec. 103, *Pers. Prop. Law*, it has been held that the buyer will be liable for the price upon tender of the bill of lading, even though he refuses to accept it. *Rosenberg & Co. vs. Buffum Co.*, 234 N. Y. 338; Sec. 123 *supra*.

§ 223. **Buyer May Be Liable for the Price Before He Has Inspected the Goods, Where They Are Shipped Through a Carrier.** It is provided in Subd. 3, Sec. 128, *Pers. Prop. Law*, that "where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words 'collect on delivery' or otherwise, the buyer is not entitled to examine the goods before payment of the price in the absence of agreement permitting such examination."

§ 224. **Where Contract Is Silent or Indefinite as to Price, Buyer Who Has Received and Used Goods Must Pay**

Reasonable Price. It is a fundamental element in every sale that there must be a price for the transfer of title to the goods. Without a price there can be no sale. This is basic in contract and sales law. The price must be agreed upon by the parties, or some definite, lawful method of agreeing upon it fixed by the parties. Otherwise, the proposed sale is in legal effect a complete nullity. *Reynolds vs. Miller*, 79 Hun. 113, aff'd 151 N. Y. 624. But where the contract makes no mention of price or is indefinite as to it, and the goods are received by the buyer and used by him, without protest, he is obligated for the fair and reasonable value thereof. *Von Reitzenstein vs. Tomlinson*, 249 N. Y. 60.

CHAPTER XVIII.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS
—LIEN AND STOPPAGE IN TRANSITU

§ 225. Remedies of an Unpaid Seller in General. The unpaid seller may in certain instances assert a lien on the goods while still in his possession or recover the goods themselves after they have left his possession, or may sue and recover damages from the buyer for breach of contract. The remedies of the unpaid seller are outlined in Sec. 134, Pers. Prop. Law, which provides:

"1. Subject to the provision of this article, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such has

"(a) A lien on the goods or right to retain them for the price while he is in possession of them;

"(b) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them;

"(c) A right of resale as limited by this article;

"(d) A right to rescind the sale as limited by this article.

"2. Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and coextensive with his rights of lien and stoppage in transitu where the property has passed to the buyer."

§ 226. When an Unpaid Seller Has a Lien on the Goods for the Price. If the sale was a credit sale, the unpaid seller has no lien on the goods for the price, even if they are left in his possession, unless the buyer becomes insolvent or the period of credit expires while he still has the goods in his possession. This is for the reason that the agreement to give credit is inconsistent with a lien. Ordinarily where there is a sale on credit, the seller is under the duty to make immediately delivery to the buyer or deliver on demand, and this duty is wholly inconsistent with the right to retain the goods as security for the purchase price. Although generally in a sale on credit, the buyer is

entitled to immediate possession, this right is not absolute but is liable to be defeated if he becomes insolvent before he obtains possession, even if title has passed, because the seller's agreement to sell on credit is based upon the implied condition that the buyer shall keep his credit good. The insolvency of the buyer does not rescind the contract but merely entitles the seller to demand payment in cash before parting with possession, even if title has passed. *Crummey vs. Raudenbush*, 55 Minn. 426. The seller is no longer under a duty to deliver on credit and the buyer is no longer entitled to possession on credit, where he becomes insolvent before, or does not pay upon, the expiration of the credit period. Upon the occurrence of either of these events, the seller's lien which was waived by the agreement for credit will revive and attach to the goods even though title had passed, provided they are still in his possession. *Tuthill vs. Skidmore*, 124 N. Y. 148; *Pardee vs. Kanady*, 100 N. Y. 121. These principles of the common law are embodied in Sec. 135, Pers. Prop. Law, which provides:

"1. Subject to the provisions of this article, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:

"(a) Where the goods have been sold without any stipulation as to credit;

"(b) Where the goods have been sold on credit, but the term of credit has expired;

"(c) Where the buyer becomes insolvent.

"2. The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer."

The mere fact that the seller holds the goods as bailee for the buyer without any change of possession, does not prevent an assertion of the seller's lien. The important fact is possession, not the manner of obtaining or retaining it, *McElwee vs. Metropolitan Lumber Co.*, 69 Fed. 302.

If prior to, or upon the expiration of the credit period, the seller extends the same for a further period by taking renewal notes, payable at a future date, it will prevent his lien from reviving, because the buyer is entitled to possession at any time during the renewal period and the seller is under a duty to deliver on demand during the renewal period. But the parties may agree that the further extension of credit shall not have that effect and such an agreement will

be good against a sub-vendee of the buyer for value and without notice in the absence of any estoppel, *McElwee vs. Metropolitan Lumber Co.*, 69 Fed. 302; for the sub-vendee buys only such right to possession as the vendee had and hence subject to the right of the original seller to withhold possession as security for the renewal notes. Even where there has been no extension of the credit period, nor renewal notes given, a sub-vendee for value and without notice, who buys from the buyer while the original credit period is running, acquires no larger right as to possession than his vendee had in the absence of any estoppel and takes subject to the possibility that before he obtains actual possession from the original seller, the latter's lien may be revived by the insolvency of his vendee or by expiration of the credit period, while the purchase price is still unpaid. In Sec. 143, Pers. Prop. Law, it is provided that the unpaid seller's right of lien is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto. But if a negotiable document of title has been issued for the goods, the seller's lien shall not defeat the right of any purchaser for value in good faith to whom such document has been negotiated.

A demand by the seller that the buyer give a chattel mortgage on the article sold is not a waiver of nor inconsistent with his assertion of a lien upon the buyer's becoming insolvent, while the article is still in the seller's possession, because the demand for a chattel mortgage will be considered merely as an alternative for payment in cash, which the seller had a right to demand. *Crummey vs. Raudenbush*, 55 Minn. 426.

The unpaid seller's right to a lien is not limited only to cases where the insolvency of the buyer occurred after the date of the contract, but exists also even where the insolvency existed at that time, but was not discovered by the seller until afterwards. This is for the reason that the seller's contract to sell on credit is conditioned not only on the buyer remaining solvent, but on the buyer being solvent at the time the contract was made.

The term "insolvent" as used in connection with the unpaid seller's lien does not mean "bankrupt." A man may be insolvent without being bankrupt. Strictly speaking, a man is not bankrupt, until he has been adjudicated a bankrupt. The term "insolvent" as applied to seller's lien cases means no more than that the buyer is unable to pay his debts or meet his financial engagements.

The seller is not precluded from asserting a lien by the fact that part of the purchase price has been paid, *Hamburger vs. Rodman*, 9 Daly, 93, 99; nor by the fact that part of the goods have been delivered. Sec. 136, Pers. Prop. Law provides: "Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an intent to waive the lien or right of retention."

The unpaid seller loses his right to assert a lien on the goods, (a) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the property in the goods or the right to the possession thereof, i. e. without taking a bill of lading to his own order or without retaining a bill of lading to the buyer's order, the lien proper is divested, but the right of stoppage in transitu, of course, remains; (b) when the buyer or his agent lawfully obtains possession of the goods, but if the goods are taken from the seller unlawfully the vendor's lien is not lost; (c) when the seller waives the lien, as where he takes renewal notes for the price. Subd. 1, a, b, c, Sec. 137, Pers. Prop. Law. The unpaid seller is entitled to a lien on the goods in his possession, even after he has recovered a judgment for the purchase price, as long as that judgment is unpaid. Subd. 2, Sec. 137.

The unpaid seller loses his lien upon delivering a negotiable warehouse receipt for the goods duly indorsed by him, *Rummell vs. Blanchard*, 167 App. Div. 654; for the negotiable warehouse receipt controls the possession.

§ 227. **Unpaid Seller's Right of Stoppage in Transitu.** If the goods have left his possession, the seller no longer has a lien, strictly speaking, but he still has a remedy against the goods themselves, inasmuch as he can upon giving notice to the carrier stop them in transit, if the buyer becomes insolvent while they are still in carrier's hands and compel the carrier to withhold delivery from the buyer or return the goods to him. The doctrine of stoppage in transitu is in effect an extension of the seller's lien to cases where the buyer becomes insolvent after the goods have left the seller's possession, but are still in the hands of the carrier, even though the carrier is the buyer's bailee, and the title to the goods has passed to the buyer. Sec. 138, Pers. Prop. Law, provides: "Subject to the provisions of this article, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the

right of stopping them in transitu, that is to say, he may resume possession of the goods at any time while they are in transit; and he will then become entitled to the same rights in regard to the goods as he would have had if he had never parted with possession."

The right of stoppage exists whether the term of credit has expired or not, if the buyer becomes insolvent. The right exists when the seller discovers insolvency during transit, and it is immaterial when the insolvency arose. Strict proof of insolvency is not required in order to justify the exercise of the right of stoppage in transitu. By the word "insolvency" as used in connection with the right of stoppage in transitu, is meant a general inability to pay one's debts; and of this inability the failure to pay one just and admitted debt would probably be sufficient evidence. Benjamin on Sales, Sec. 837; *Jeffris vs. Fitchburg R. Co.*, 93 Wis. 250, 256; *Hays vs. Merville*, 14 Ap. St. 48, 51. Where the buyer has assigned for the benefit of creditors (*Buckley vs. Furniss*, 17 Wend. 504), or "failed in business" (*Clark vs. Lynch*, 4 Daly 83, 86), or his paper has gone to protest (*Holbrook vs. Vose*, 6 Bosw. 76), it has been held that the buyer was insolvent to such an extent that the right of stoppage arose.

§ 228. Ways of Exercising the Right to Stop. Sec. 140, Subd. 1, Pers. Prop. Law, provides:

"1. The unpaid seller may exercise his right of stoppage in transitu either by obtaining actual possession of the goods or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may prevent a delivery to the buyer."

In other words where the carrier is a railroad, notice may be given either to the person in actual possession of the goods; e. g. the station agent, or to his superior, the traffic or freight manager. If notice is given to the latter, in order to be effectual, it must be given within such time that he may by the exercise of reasonable diligence, pass the notice along not only to the station agent at the point of destination, but to all the station agents along the line so as to prevent the buyer from intercepting and obtaining delivery of the goods at an intermediate station.

Where goods are on a vessel awaiting unloading, the right of stoppage is properly exercised by giving notice of the seller's claim to the owner of the vessel, the custom house officers, and the assignee in bankruptcy of the buyer. *Harris vs. Pratt*, 17 N. Y. 249.

§ 229. **Carrier's Duty on Receiving Notice to Stop** Sec. 140, Subd. 2, Pers. Prop. Law, provides: "2. When notice of stoppage in transitu is given by the seller to the carrier, or other bailee in possession of the goods, he must redeliver the goods to, or according to the directions of the seller. The expenses of such delivery must be born by the seller. If, however, a negotiable document of title representing the goods has been issued by the carrier, or other bailee, he shall not be obliged to deliver or justified in delivering the goods to the seller, unless such document is first surrendered for cancellation."

Where the seller has given the carrier proper notice to stop the goods and the carrier does not, he will be liable to the seller in trover for the value of the goods. *Hunter vs. Payne*, 113 Misc. 385. But the carrier need not redeliver the goods to the seller until (1) the seller surrenders to the carrier the order bill of lading, if any was issued for the goods, and (2) the seller pays the carrier the expenses of returning the goods. If the seller cannot pay the expenses of returning the goods, nor surrender the order bill of lading, the carrier can hold the goods for the account and risk of the seller until he does so.

§ 230. **How Long the Right of Stoppage Exists.** In general it may be stated that the right of stoppage exists as long as the goods are in the original transit, unless an order bill of lading for the goods is transferred to a bona fide purchaser for value before the transit is completed. The question as to when the goods are in the original transit will be discussed in the following section.

A transfer of an order bill of lading to a bona fide purchaser for value while the goods are in transit deprives the seller of his right of stoppage in transitu, *Lickbarrow vs. Mason*, H. L. 1793, 6 East 20, note. If the rule were otherwise, no one would be safe in buying an order bill of lading until the goods had arrived and been delivered to the consignee. The decision in *Lickbarrow vs. Mason*, *supra*, rests on the policy of the law and of business to protect bona fide purchasers of documents of title. It has been held that in a transfer of the order bill of lading to a bona fide pur-

chaser *after* notice to stop has been given to the carrier, the bona fide purchaser is entitled to receive the goods from the carrier as against the vendor. *Newhall vs. Central Pac. R. Co.*, 51 Cal. 345. In Sec. 143, Pers. Prop. Law, it is provided that the unpaid seller's right of stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller assented thereto, but if a negotiable document of title has been issued for the goods, the seller's right of stoppage in transitu shall not defeat the right of any purchaser for value in good faith to whom such document has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier, or other bailee who issued such document, of the seller's claim to a lien or right of stoppage in transitu. But no sub-sale by the buyer during transit will defeat the seller's right of stoppage in transitu, if the sub-sale is not accompanied by the transfer of an order bill of lading.

Even though a straight bill of lading was issued and the buyer's creditors have attached the goods in transit, the seller may still exercise his right of stoppage in transitu and recover the goods from the buyer's attaching creditors, because attaching creditors are not purchasers for value. But where such an attachment has been made, notice of stoppage should be given to the attaching creditor. *Clark vs. Lynch*, 4 Daly. 83. If the transit was not ended, the right to stop takes precedence over any attachment or execution levied by the buyer's creditors, *Blackman vs. Pierce*, 23 Cal. 508. The right of stoppage as well as the seller's lien is superior to the lien of an attaching creditor of the buyer. The attaching creditor gets no better right than the buyer—he merely stands in the buyer's shoes. The seller's lien and right to stop is good against the buyer, so it will be good against the buyer's creditors.

Where the buyer has, while the goods are in transit, pledged the order bill of lading as security for a loan in a lesser amount than the value of the goods, and then becomes insolvent, the seller should on equitable principles have the right to stop the goods for the excess of their value over the amount of the loan and this right should be good as against the claims of the buyer's creditors. *Berndtson vs. Strang*, (1867) L. R. Eq. 481.

Where a portion of the goods has been actually received by the buyer, the seller may nevertheless exercise the right of stoppage as to the remainder of the goods. Sec. 139, Subd. 4, provides: "If part delivery of the goods has been

made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement with the buyer to give up possession of the whole of the goods."

§ 231. **When Are Goods in the Original Transit.** The original transit is ended and the right to stop ceases when the goods are delivered by the carrier to the buyer, or to one who is the agent of the buyer for purposes other than immediate further transportation of the goods contemplated in the contract of sale. Sec. 139, Subd. 1, Pers. Prop. Law, provides: "Goods are in transit within the meaning of section one hundred and thirty-eight, (a) From the time when they are delivered to a carrier by land or water, or other bailee for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee; (b) If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, even if the seller has refused to receive them back."

The transit does not end until there is delivery of actual possession to the buyer or to an agent of his, unless that agent is an agent for immediate further transportation then contemplated in contract of sale. A constructive delivery, merely, such as delivery of the bill of lading to the buyer, will not terminate the seller's right to stop.

Where the transit is broken, to be renewed again, the right of stoppage in transitu is not necessarily gone. It depends upon whether the contract of sale contemplated that the goods should be forwarded to the ultimate destination or only to the point where the transit is again renewed. In *Becker vs. Hallgarten*, 86 N. Y. 167, the sellers, merchants in Berlin, sold goods on credit to the buyer who also resided in Berlin, under a contract by which the goods were to be shipped by the direction of the buyer to the plaintiff, his agent, in Bremen. The plaintiff had been instructed by the buyer to hold the goods on arrival in Bremen, subject to the order of one Goldstein, a banker, to whom the buyer had given the bills of lading as security for a loan. Goldstein directed the plaintiff to ship the goods to the defendants in New York, with directions to deliver them to one Stern in New York. Subsequently, the sellers instructed the plaintiff to cable to the defendants, stopping the goods in transit, which he did, and they assigned to the plaintiff their claim against the buyer for an accepted draft for the price, which

was not paid. Upon demand, the defendants refused to re-deliver the goods to the plaintiff. In an action for conversion, it was held that the plaintiff could not recover as the right to stop had ceased before the goods left Germany. It was not part of the original contract of sale that the goods were to be sent to New York. Under the original contract the goods were to be sent to Bremen only. The original transit ended, therefore, on delivery to Goldstein at Bremen. Some other action was necessary on the part of the buyer or Goldstein before they moved again, and that action was not contemplated nor provided for in the original contract of sale.

In *Harris vs. Pratt*, 17 N. Y. 249, the buyer had places of business in Liverpool and in New York. He ordered goods of the seller in England, to be sent by the seller to the buyer's agent at Liverpool for *shipment to New York*. While the goods were in transit from Liverpool to New York, the buyer became insolvent and it was held that the seller had the right of stoppage in transitu. In *Becker vs. Hallgarten*, supra, the goods had reached the place for which they were intended under the direction given by the buyer to the seller; but in *Harris vs. Pratt*, supra, the suspense in transportation was temporary only, and to be resumed at a future time in the direction *already given* by the buyer to the seller. Where the goods are delivered by the seller or carrier to an agent of the buyer at an intermediate point to await directions from the buyer regarding the manner of carriage to a final destination *previously mentioned by the buyer to the seller*, the transit is not ended and the seller's right of stoppage continues until the goods reach the final destination mentioned.

In *Bethel & Co. vs. Clark & Co.*, Court of Appeals, 1888, 20 Q. D. Div. 615, one Clark of Wolverhampton, England, sold goods to Tickle of London. The order for the goods did not specify any place to which they were to be sent but the buyer wrote to the seller as follows: "Please consign the ten hogsheads of hollow ware to the Darling Downs, to Melbourne, loading in the East India Docks here." The goods were delivered by the vendor to the railway to be forwarded to the ship "Darling Downs" at the East India Docks, London. The seller, being informed that the buyer was insolvent, gave notice to the railway company, and the latter gave notice to the lighter company, but it was too late as the ship had sailed with the goods. Before the ship arrived at Melbourne, the seller wrote to the shipowners

claiming the goods. It was held that the seller's right to stop the goods continued until they arrived at Melbourne, because the goods had been delivered to the buyer's agent, the captain of the ship at London, with instructions to forward them to a destination, Melbourne, previously mentioned by the buyer to the seller. Where a further destination is previously mentioned by the buyer to the seller, the original transit carries through to that destination. But if the goods have been delivered to the buyer's agent *at the only place mentioned in the contract or mentioned by the buyer to the seller*, and they are *afterwards* in transit in consequence of *fresh directions* given by the buyer to his agent, the right to stop is gone.

Even though the goods are shipped by the buyer's agent to a final destination *not* previously mentioned by the buyer to the seller, if the buyer's agent to whom the seller delivered the goods was an agent for transportation only, the right to stop continues. In Williston on Sales, Sec. 524, it is said: "The right of stoppage exists until the goods have been delivered to the buyer personally, or to some agent whose obligation to him is not confined to the single duty of carrying or delivering the goods to him. A typical case of an agent of the latter sort is a carrier, but it makes no difference whether the bailee is 'a carrier, a warehouse-keeper, or wharfinger, packer, or other depository, or an agent for the purpose of forwarding, nor by which of the parties to the sale he was employed. He may be the agent of the purchaser, designated, paid, and employed by him; yet if the purpose of his employment is to expedite the property toward its destination, or to aid those engaged in forwarding it, the seller's right to stay the final delivery continues' (Quotation from *Harris vs. Pratt*, 17 N. Y. 249)."

Williston (Sales, Sec. 530) after reviewing the authorities on the subject of broken transit, says: "From these decisions some important conclusions may be deduced. (1) It does not exclude the right of stoppage that the seller is ignorant of the terminus of the transit. (2) It does not exclude the right of stoppage that by the terms of the contract the goods are to be delivered and are delivered to a carrier f. o. b. (3) It does not exclude the right of stoppage that the goods are sent to a forwarding agent for the buyer. If the agent's only duty is to forward the goods he is merely a link in the transit. And it seems that it is not material whether the seller knows the forwarding agent is merely a link in the transit or not. Nor is it important that the for-

warding agent, if requested by the buyer, would alter the destination of the goods or hold them to await the buyer's orders. A carrier similarly might allow the buyer to interfere with the destination of the goods. Such interference would terminate the right of stoppage; but the possibility of it does not deprive the buyer of his right. (4) If goods are delivered to a bailee who is subject to such orders as the buyer may choose to give in regard to the goods, the transit is ended when the agent receives the goods, though the seller has been informed by the buyer of the ultimate destination which he means to give the goods, and though the agent does in fact forward them to that destination. (5) The seller may, by special terms in his contract, bargain that there shall be a special transit. Such bargain is in effect an agreement that the seller shall have the chance of stoppage during a specified journey, and is binding upon the buyer and his assignees in bankruptcy."

§ 232. **Stoppage in Transitu Applies to the Carriage and Not Mere Storage of Goods.** Where warehouse receipts or other documents of title are delivered by the seller to the buyer, the question of stoppage in transitu is not likely to arise. In *Rummell vs. Blanchard*, 210 N. Y. 348, the seller had transferred to the buyer a negotiable warehouse receipt and later sought to stop the goods. The Court said: "The plaintiffs insist that if they have lost their lien, they may none the less regain possession by the exercise of the right of stoppage in transitu. This claim need not long detain us. Merchandise is not in transit unless it has been delivered to a bailee for the purpose of transportation. *Rosenthal vs. Weir*, 170 N. Y. 148, 154; *Harris vs. Pratt*, 17 N. Y. 249, 252. This merchandise was never delivered to a bailee for that purpose. *Williston on Sales*, Sec. 524; *Pers. Prop. Law*, Sec. 139. Since no transit was ever begun, there was none to intercept. It is true that the possession of the bailee was transformed from a possession for the account of one bailor into a possession for the account of another. If this change of the bailee's relation could be deemed equivalent to a transit of the merchandise, the same act which marked the beginning of the transit marked also its end. We may concede that while merchandise is still in course of transportation, the right of stoppage may be exercised against warehousemen as well as against carriers. *Harris vs. Pratt*, supra. The warehousemen, in such circumstances, is an intermediary in the process which culminates in delivery. But where that process has been completed, and the warehouse-

man has undertaken to keep the goods as agent of the vendee, the merchandise is then at rest, and the right of stoppage is extinguished. Williston on Sales, supra; 25 Halsbury's Laws of England, p. 251."

§ 233. **Interception of the Goods by the Buyer at an Intermediate point as Affecting the Seller's Right of Stoppage in Transitu.** "The right of stoppage in transitu is nothing for which the seller bargains, and the law allows it to him only while circumstances render it feasible; that is, while the goods are in transit. The seller has no cause to complain if the transit is ended sooner than might have been expected, since he loses nothing to which he was entitled; but the possibility of protecting him, in spite of his complete transfer of title to the goods, ceases. Accordingly if the buyer intercepts the goods at a point before the destination originally fixed, the seller's right is gone." Williston on Sales, Sec. 527. But after a proper notice to stop the goods has been given, the delivery of them to the buyer at an intermediate point will render the carrier liable to the seller in conversion for the value of the goods.

§ 234. **Right of Stoppage in Transitu as Affected by the Nature of the Carrier.** The doctrine of stoppage in transitu applies to any form of transportation. The seller has the right to stop the goods even if they are being transported by a private carrier instead of by a common carrier. *Johnson vs. Eveleth*, 93 Me. 306. And where the consignment is not to a railroad station but by express to the buyer's place of business, the right to stop continues while the goods are on the express company's trucks. "If, however, the carrier's duty is fully performed when the goods arrive at the railroad station, and it does not voluntarily undertake to deliver them, and a truckman is sent by the buyer to receive the goods, the transit ends when the goods are received at the railroad station by the buyer, or by a truckman acting as his agent. The carriage of the goods by the truckman is in this case a new journey under the direction of the buyer." Williston on Sales, Sec. 531.

The right of stoppage is not ended by placing the goods on the buyer's own ship where the seller takes a bill of lading to his own order, thus making the captain of the ship an intermediary between himself and the buyer, so that delivery to the buyer's ship is not a delivery to the buyer. *Berndtson vs. Strang*, (1867) L. R. Eq. 481. "The mere fact that the vessel is chartered by the buyer does not, how-

ever, make a delivery to the ship a delivery to the buyer. The ordinary charter of a vessel does not make the captain a servant of the charterer. The owner still remains the captain's employer, and the charterer is only entitled to direct what goods the ship shall carry and where they shall be carried. On the other hand, if there is what is known as a 'demise' of the ship, the buyer is in effect the temporary owner of the vessel, and there is no right to stop the goods." Williston on Sales, Sec. 532.

CHAPTER XIX.

SELLER'S RIGHTS OF RESALE, RESCISSION AND TO DAMAGES.

§ 235. **When Seller Has Right to Resell the Goods.** When the seller has asserted his lien on sold goods left in his possession, or has recovered the goods by stoppage in transitu, he is allowed to resell them in the following instances, without being liable to the buyer for breach of contract: (1) where the goods are of a perishable nature, (2) where in the contract the seller has expressly reserved the right to resell, or (3) where the buyer has been in default in payment for an unreasonable time. Subd. 1, Sec. 141.

§ 236. **When Notice of Resale Is Necessary.** Where the goods are of a perishable nature, or the seller has expressly reserved in the contract the right to resell, he does not need to give any notice of resale to the buyer. Subd. 3, Sec. 141. But where the seller bases his right to resell on the third instance mentioned in Subd. 1, Sec. 141, i. e., "where the buyer has been in default in payment an unreasonable time, Subd. 3, Sec. 141, makes the giving or failure to give notice of intention to resell relevant evidence upon the question as to whether the resale was within a reasonable time or not, after the default of the buyer. Even in such a case, it is not essential to the validity of a resale that notice of the time and place of such resale should be given by the seller to the original buyer. Subd. 4, Sec. 141.

§ 237. **On Resale, Buyer Acquires a Good Title as Against the Original Buyer.** Although title had passed to the first buyer, the seller can, nevertheless, resell the goods, and give a good title to the second purchaser. The seller's rights, where the buyer becomes insolvent before obtaining the goods, is often called a lien, but it is greater than a lien, since he can resell the goods without notice, and vest a purchaser with a good title. "His right is very nearly that of a pledgee, with power to sell at private sale, in case of default." *Tuthill vs. Skidmore*, 124 N. Y. 148.

§ 238. **Resale May Be Either by Public or Private Sale.** The unpaid seller exercising his right under the Sales Act

to resell the goods, after the buyer's default and insolvency, without notice, must exercise due diligence and good faith to sell in the best market at the highest obtainable price. *Atlantic City Tire & Rubber Corp'n vs. Southwark Foundry & Machine Co.*, 137 Atl. Rep. 807 (Supreme Court of Pennsylvania, 1927); *Farrish Co. vs. Harris Co.*, 122 Misc. 611. But, in the absence of evidence to the contrary, the sum received will be presumed to be the best that could be secured. *Raymond vs. Phipps*, 215 Mass. 559; *Arkansas Short Leaf Lumber Co. vs. Hemler*, 281 Fed. 914. The resale may be either by public or private sale but the seller is bound to exercise reasonable care and judgment in making the resale, Subd. 5, Sec. 141. If the resale be by public sale under a licensed auctioneer, the seller may himself buy the goods and sue the buyer for the difference between the net proceeds of the resale and the contract price. *Ackerman vs. Rubens*, 167 N. Y. 405.

The resale need not be at the place where the goods are at the time of the buyer's refusal to take them, or are to be delivered, but may be made at a distant market, if a better price can be secured there. *McGibbon vs. Schlessinger*, 18 Hun. 225; *Lewis vs. Greider*, 51 N. Y. 231.

§ 239. **Unpaid Seller Must Wait for a Reasonable Time After the Buyer's Default Before Reselling.** The unpaid seller may not exercise his right under the Sales Act, after the buyer's default and insolvency, to resell the merchandise without notice, until a reasonable time after the default. Or, in other words, the unpaid seller must wait for a reasonable time after the buyer's default before reselling. *Atlantic City Tire & Rubber Corp'n vs. Southwark Foundry & Machine Co.*, 137 Atl. Rep. 807; *Hausman vs. Buchman*, 189 App. Div. 597.

§ 240. **Resale Must Be Held Within Reasonable Time After Breach.** The unpaid seller may estimate his loss by making a resale of the goods. *Hubbard vs. Rockaway Lunch Co., Inc.*, 131 Misc. 53. But if the resale is for the purpose of fixing damages, it must be held within a reasonable time after the breach, *Bigelow vs. Legg*, 102 N. Y. 562; *Almy vs. Simonson*, 52 Hun. 535; and it must be fairly made, *Case vs. Simonds*, 7 N. Y. S. 253; *Dustan vs. McAndrews*, 44 N. Y. 72.

§ 241. **Seller Has Right to Resell, Even After He Has Elected to Sue for the Purchase Price.** As the right of resale is given to the seller as a means of determining his

damages, he is allowed to resell the goods and to recover as his damages the difference between the net resale price and the contract price. *Dustan vs. McAndrew*, 44 N. Y. 72, 78. Where the seller has elected to sue for the purchase price, he in effect affirms the contract and seeks to recover damages for its non-performance. It is not inconsistent with that position for him to attempt to determine his damages by means of a resale. So, it has been held that the seller has the right to resell the goods, even after he has elected to sue for the purchase price. *D'Aprile vs. Turner-Looker Co.*, 239 N. Y. 427. In such a case the buyer may set up the proceeds of the resale as a set-off.

After the title has passed and the buyer defaults for an unreasonable time in the payment of the price, the seller may resell the goods under Sec. 141, and then sue for the balance of the purchase price. *Taylor vs. Kurzrock*, 214 App. Div. 308.

Even where title has not passed to the buyer, the seller has the right, upon the buyer's default, to resell the goods in order to fix the measure of the buyer's liability for failure to fulfill his obligation.

The unpaid seller's right under the Sales Act to resell the goods after the buyer's default and insolvency, without notice either of the vendor's intention or of the time and place of such sale, is not lost by the retention of sums advanced in partial payment or by recovering a judgment for the price of the goods. *Atlantic City Tire & Rubber Corp'n vs. Southwark Foundry & Machine Co.*, 137 Atl. Rep. 807; *D'Aprile vs. Turner-Looker Co.*, 239 N. Y. 427.

§ 242. **Seller's Right to Rescind the Contract.** An unpaid seller may rescind the sale only where he either has a right of lien on the goods in his possession or has stopped them in transitu, Sec. 142. Therefore, if the goods have been delivered into the buyer's possession, the unpaid seller no longer has the right to rescind the sale merely for the reason that the buyer does not or cannot pay the price; but he still has the right to rescind the contract if there was fraud, duress, or mistake in inducing the contract.

If the unpaid seller has a lien on the goods in his possession or has stopped them in transitu, he may rescind the sale only in the following two instances: (1) where he has expressly reserved the right to do so in the contract of sale, or (2) where the buyer has been in default in the payment of

the price an unreasonable time. After he has thus rescinded the sale, he shall not be liable to the buyer on the contract of sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or sale. Subd. 1, Sec. 142.

§ 243. **Seller Must Give Notice of Rescission to the Buyer.** The seller must manifest his intention to rescind by giving notice thereof to the buyer, or by doing some overt act indicating such an intention; otherwise the transfer of title shall not be held to have been rescinded. Subd. 2, Sec. 142. It is not necessary that such overt act should be communicated to the buyer but the giving or failure to give notice to the buyer of the intention to rescind shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the right of rescission was asserted. Subd. 2, Sec. 142.

§ 244. **Seller's Right of Rescission Under Sec. 146, Pers. Prop. Law.** The seller's right of rescission under Sec. 142, is limited to the following cases: (1) where he expressly reserved the right to do so in case the buyer should make default, or (2) where the buyer has been in default in the payment of the price an unreasonable time. In addition, where the goods have not been delivered to the buyer, Sec. 146 gives the seller the right to rescind (1) where the buyer has repudiated the contract to sell or sale (i. e., anticipatory breach), or (2) where the buyer has manifested his inability to perform his obligations thereunder (as where the buyer has become insolvent), or (3) where the buyer has committed a material breach of the contract. But where the seller elects to rescind the contract under Sec. 146, he must give notice of his election so to do to the buyer.

However, Sec. 146 contemplates a situation where the facts and circumstances may not be sufficient to justify the seller in "totally" rescinding the contract, but sufficient to justify him in refusing to go ahead with his own performance. Where that is the situation, i. e. where the buyer breaks or repudiates his contract, the seller may refrain from tendering or performing on his own part and sue on the contract for damages *without giving notice of his intention to rescind*. *Henderson Tire & Rubber Co. vs. Wilson*, 235 N. Y. 489, overruling *Rubber Trading Co. vs. Manhattan Rubber Mfg. Co.*, 221 N. Y. 120; *Helfant vs. Manhattan Paper Co.*, 184 N. Y. S. 611; *Putnam-Hooker Co. vs. Iron Clad Overall Co.*, 204 App. Div. 40; *Henderson Tire & Rubber Co. vs. Wilson*, 203 App. Div. 773.

In reference to Sec. 146, Pers. Prop. Law, Williston says, Sales, Sec. 591a: "In fact this section of the Sales Act has no reference to actions for damages for breach of contract. That topic is dealt with in the preceding section (Sec. 142).

. . . . The matter is vital, since the preceding section (Sec. 142) makes no requirement of notice by an injured seller in order to justify him in refraining from making a useless tender and nevertheless suing the buyer for breach of contract;" and in Sec. 592: "Though it will generally be more favorable for a seller, if the buyer makes default, not to rescind the contract, but merely to rely on his own excuse for not performing, and sue the buyer for his default on the contract, the seller has the right (under Sec. 146) if he so desires to rescind the contract altogether." That is why the word "totally" has been inserted in Sec. 146 before the word "rescind." "The evident purpose of the Act with reference to the seller's remedies is first to provide for an action on the contract in the preceding section (Sec. 142), and then in Sec. 146 to provide for the alternative remedy of rescission." Williston on Sales, 591a.

"Though the seller who has elected for due cause to rescind (using that word in the strict sense of the preceding sections) a contract, cannot thereafter sue upon it, he is entitled to recover the value of whatever he has delivered to the buyer." Williston on Sales, Sec. 593. Where, after the buyer has repudiated or abandoned the contract, the seller sues him on the contract for breach of contract, he is entitled to recover as damages the amount necessary to put him in the position he could have been in if the contract were carried out. But where after the buyer has repudiated or abandoned the contract, the seller totally rescinds the contract under Sec. 146, the seller may sue the buyer to recover the reasonable value of what he has given, i. e. to be put in the same position as if the contract had never been made.

As to the applicability of Sec. 146, see *Henderson Co. vs. Wilson Co.*, 235 N. Y. 489; *Heller vs. Continental Mills*, 233 N. Y. 641; *Estes vs. Curtiss Corp.* 232 N. Y. 572; *Strasbourg vs. Leerburger*, 233 N. Y. 55.

§ 245. Difference Between Resale Under Sec. 141 and Resale After Rescission Under Sec. 142. Under Sec. 141, the seller may resell as lienor, and in such case he does not act as owner, but by virtue of a power. It is, therefore, his duty to act prudently and fairly, like an agent or fiduciary. And he must deduct the net resale price from the contract price in arriving at the damages recoverable by him from

the buyer for breach of the contract. Under Sec. 142, the seller may rescind the transfer of title; and if he resells thereafter, he is acting for his own account. He may sacrifice the goods or waste them, for what he does, he does as owner and not as lienor. *D'Aprile vs. Turner-Looker Co.*, 239 N. Y. 427. And he need not deduct the resale price from the amount of damages recoverable from the buyer, for in such case he keeps the property as his own, and may recover as damages the difference between the market price at the time and place of delivery and the contract price. *Dustan vs. McAndrew*, 44 N. Y. 72, 78; Subd. 3, Sec. 145, Pers. Prop. Law.

§ 246. **Seller May Resell at Once After Rescission Without Liability to Buyer, but if It Is Not a Case for Rescission, Seller May Be Liable to Buyer for Resale After Refusing Tender Made Within Reasonable Time After Default.** If the buyer becomes insolvent while the goods are still in the seller's position, or if the goods are recovered by a stoppage in transitu upon learning of the buyer's insolvency, the seller has the right to resell the goods at once without being liable to the buyer for breach of contract, even if the credit period has not yet expired. *Diem vs. Koblitz*, 49 Ohio St. 41. This is for the reason that if the insolvency of the buyer is discovered by the seller, while he yet has the goods, or while they are in transit, and he retakes them, he may elect to treat the agreement for credit as at an end, and resell the goods, unless the buyer pays or tenders the price agreed upon. The buyer's prospective inability to pay justifies the seller in refusing to carry out the contract on the ground of prospective failure of consideration. The fact that the buyer is insolvent justifies the seller in assuming that the buyer is not going to tender the price when the credit period expires. But if the seller still has possession of the goods and has not resold them, and the buyer tenders the price, the seller must deliver them to him.

Where, however, the credit period expires while the goods are still in the seller's possession, he has not the right to resell the goods at once, but must wait a reasonable time after the default before he can rightfully sell. In *Martindale vs. Smith*, 1841 1 Q. B. 389, there was a sale of a quantity of oats on credit, i. e., payment was to be made within twelve weeks. The oats were left in the seller's possession. The buyer did not pay at the end of the twelve weeks, but tendered the price three days thereafter. The seller refused to accept the tender and afterwards sold the oats to an-

other. It was held that after the expiration of the credit period the seller had only a lien till the price was paid, and not a right to rescind the contract until more than a reasonable time for tender of the price, after the credit period had expired, had elapsed, and as more than such reasonable time had not elapsed, the seller's lien was forfeited by refusal to accept a tender of the price within that time. If the buyer makes tender of the price within a reasonable time after default in payment, the seller cannot refuse to let him have the goods. In *Diem vs. Koblitz*, supra, it was held that where the buyer becomes insolvent while the goods are en route, the seller will not be liable for breach of contract, if he sells the goods at once upon recovering them by a stoppage in transitu, because the buyer has broken an implied condition of the contract by becoming insolvent and that is so material a breach as to justify the seller in rescinding the contract without being liable to the buyer for doing so. But in *Martindale vs. Smith*, supra, the buyer's failure to pay the price on the due day, although a breach of the contract, was not so material a breach as to justify the seller in rescinding the contract. Instead, it merely revived the seller's lien and he must deliver the goods to the buyer upon tender of the price within a reasonable time after the lien revived. But if the buyer does not tender the price within a reasonable time after the credit period has expired, the seller under Sec. 142 has the right to rescind the contract by reselling the goods or otherwise treating them as his own.

§ 247. **If Resale Is at Profit, Seller Need Not Account to Buyer for Profit.** Where the resale is for a greater price than that originally bargained for, it is sometimes urged that the buyer should be entitled to the profit thereby made. On this point, Williston (*Sales*, Sec. 553) says: "It is said that the seller, in making the resale is acting as the agent for the buyer; that only on this theory can the liability for the buyer for loss incurred on the resale be explained, and that the same reasoning requires the seller to account for any profit. It may be admitted that the seller, in making a resale, is in part at least acting on behalf of the buyer. It is more accurate, however, to say that he is acting by virtue of an authority or power given by law than to say that he is the buyer's agent, as is frequently done." Williston points out that there are two objections to calling the seller the buyer's agent in the resale of the goods. First, "it assumes that there is a consensual relation between buyer and seller in regard to the matter," which is not the fact, "and calling

the agency an implied one only partially avoids this objection, since 'implied' has the double meaning of 'inferred as a fact from circumstances' and 'imposed by law.'" Secondly, "to speak of the seller as an agent seems to imply that his sole duty is to the person called his principal. Now, though the seller in making a resale is bound to protect the buyer's interests so far as they are not inconsistent with his own rights, the primary considerations which actuate him are, and properly may be, his own interest and not the buyer's. It will be replied that though it be granted that the seller resells by virtue of an authority given by law as a pledgee or a mortgagee sells on foreclosure, the sale is, nevertheless, for the buyer's account, and, therefore, the buyer should have the profit. There seems no answer to this unless the seller has the right totally to rescind the sale, revest them as his own, and take the proceeds for his own account. That the seller has this alternative right will be seen from the following sections, but here it may be said that on whatever reasoning the doctrine is based, the law seems to recognize the seller's right to keep any profit from the resale." Williston on Sales, Sec. 553; see also *Bridgford vs. Crocker*, 60 N. Y. 627. This is expressly so provided in Subd. 1, Sec. 141, Pers. Prop. Law.

§ 248. **Seller Has Right to Rescind the Contract of Sale if Induced to Enter Into It by Fraud of Buyer.** If the seller was induced by the fraud of the buyer to enter into the contract of sale, he may rescind it and recover the goods unless they have been resold by the fraudulent buyer to an innocent purchaser for value. Fraud on the part of the buyer does not render the contract of sale void, but voidable only, and the defrauded seller may rescind it within a reasonable time after discovering the fraud if the goods have not in the meantime been resold to a bona fide purchaser. We have already seen (Sec. 156 *supra*) that "it is important to observe whether the fraudulent person induces the defrauded person to assent to a transfer of title or merely to assent to a transfer of possession. In the latter case, the fraudulent person can transfer no better title even to a bona fide purchaser for value without notice than any possessor of goods without title." Williston on Sales, Sec. 625a; *Heilbronn vs. McAleenan*, 1 N. Y. S. 875. "If a buyer obtains by fraud the seller's assent to transfer the ownership of goods, there is no doubt that the buyer gains title thereby. Yet there is no more doubt that the seller may regain his title by his own election so to do." Williston on Sales, Sec. 567.

§ 249. **What Constitutes Fraud on the Part of the Buyer Such as to Entitle the Seller to Rescission.** A misrepresentation of the buyer's solvency or ability to pay for the goods, by which the seller is induced to give credit to the buyer, if going beyond an expression of opinion, is fraudulent. *Fitchard vs. Doheny*, 93 App. Div. 9. A buyer of goods is responsible for misrepresentations of solvency, not only when made by him in person, but when made by his agents, and false statements made to credit agencies and afterwards furnished to one who in reliance thereon sells the goods, makes the buyer guilty of fraud if his statements were made with knowledge of their falsity. *Tindle vs. Birkett*, 57 App. Div. 450, *aff'd* 171 N. Y. 520; *Arnold vs. Richardson*, 74 App. Div. 581. If, however, a credit agency obtains the facts upon which it bases its rating from outside sources, and not from the buyer or some one authorized by him, the seller cannot treat a sale induced thereby as fraudulent, *Macculiar vs. McKinley*, 99 N. Y. 353. But, if in such a case, the buyer referred the seller to his credit rating or credit agency, he thereby approves it as correct, and is in the same position as if he had furnished it himself. *Williston on Sales*, Sec. 636b.

The mere nondisclosure by the buyer of his insolvency will not suffice to avoid a sale, *Nichols vs. Pinner*, 18 N. Y. 295; *Nichols vs. Michael*, 23 N. Y. 264; *Wright vs. Brown*, 67 N. Y. 1; *Hotchkin vs. Third Nat. Bank*, 127 N. Y. 329; but where the buyer at the time of the purchase was insolvent and intended not to pay for the goods, it is a fraud which will render the purchaser's title voidable, *Hall vs. Naylor*, 18 N. Y. 588; *Hennequin vs. Naylor*, 24 N. Y. 139; *Whitten vs. Fitzwater*, 129 N. Y. 626; and where the buyer knows that his financial condition is such that it will be impossible for him to pay, the inference is strong that he did not intend to pay, *Johnson vs. Monell*, 41 N. Y. 655.

§ 250. **Seller May Rescind if Contract Was Entered Into by Mistake or Duress.** If the contract was entered into under mutual mistake as to the identity or existence of the subject-matter, it is void. But a mutual mistake as to value will not render the contract unenforceable. A unilateral mistake induced by fraud on the part of the other party will enable the mistaken party to rescind.

Where the seller has been coerced into signing the contract by legal duress, he may rescind.

§ 251. **Seller May in Some Instances Withdraw from**

an Illegal Contract or Where Performance Has Become Impossible. If a seller is not in *pari delicto*, and it would discourage the carrying out of the illegal act or frustrate the illegal purpose to allow the seller to withdraw, he may do so if the contract is still executory. *Hooker vs. Di Palos*, 28 Ohio State, 251. Likewise, where performance on his part has become impossible, due (1) to operation of law, or (2) where the contract related to a specific subject-matter which has ceased to exist, or (3) where the contemplated means of performance are destroyed or cease to exist, the seller is excused for non-performance.

§ 252. **Remedies of the Seller on the Contract.** The unpaid seller has ordinarily the choice of one of the following three remedies: (1) he may store or retain the goods for the buyer and sue him for the entire purchase price; (2) he may sell the goods acting as the agent of the buyer for this purpose and recover the difference between the contract price and the net price obtained on such resale; or (3) he may keep the goods as his own and recover the difference between the contract price and the market price at the time and place of delivery. *Dustan vs. McAndrew*, 44 N. Y. 72, 78.

§ 253. **Where Title Has Passed Seller May Maintain an Action for the Price, Although Buyer Refuses to Accept Delivery.** Where title has passed, the seller may sue and recover the purchase price, even though the buyer has refused to accept the goods. The seller is not bound under such circumstances to sell the goods and sue for the difference between the resale price and the contract price, but may maintain an action for the purchase price; Subd. 1, Sec. 144, Pers. Prop. Law; *Bement vs. Smith*, 15 Wend. 493; *Storm vs. Rosenthal*, 156 App. Div. 544; even though the goods are defective or delivery delayed, so that the buyer, had he chosen to do so, might have refused to accept title, *Talcott vs. Slater Bros. Co.*, 171 App. Div. 395; although in the latter case, the buyer may counterclaim damages for breach of warranty.

§ 254. **Title Is Deemed to Have Passed Within the Meaning of Sec. 144, Although the Seller Has Reserved the Property in the Goods Under the Terms of a Conditional Sale or by Taking a Bill of Lading to His Own Order.** Under Subd. 1, Sec. 144, the seller can recover the price where the property in the goods has passed. Since the word "property" is defined in Sec. 156 to be "the general property in

goods, and not merely a special property," it would seem as though a seller who has retained only a security title, as in conditional sales and shipment of goods under a bill of lading to the seller's order, could not recover the price. But it has been held by the Court of Appeals that the seller can recover the price where tender of the bill of lading is rejected, *Rosenberg vs. Buffum Co.*, 234 N. Y. 338. It should be remembered that the definitions in Sec. 156 are by the terms of that section applicable "unless the context or subject matter otherwise requires." Since the provisions of Sec. 103 of the statute imposes risk of loss on the buyer under such a shipment, it necessarily indicates that the price may be recoverable though the seller still retains a security title. "It cannot be supposed that such a seller should be allowed to recover the price when the goods are destroyed, and yet denied full recovery when they are actually tendered." *Williston on Sals*, Sec. 560b.

The seller should be denied an action for the price, unless the property has passed (subject to the exceptions contained in Subds. 2 and 3, Sec. 144) for the reason that as the seller is still the owner of the goods, he ought not to be given also the price for them. In such a case his damage is the difference in value between what he now has, namely, the goods, and what he would have had, if the defendant had not broken his contract, namely, the price.

§ 255. **Where Title Has Not Passed, Seller Can Recover Purchase Price Only Where Goods Cannot Readily Be Resold for a Reasonable Price.** If the title has not passed to the buyer, the seller cannot recover the purchase price, unless the goods cannot readily be resold for a reasonable price, Subd. 3, Sec. 144, *Pers. Prop. Law*; and the seller has notified the buyer that he is holding the goods as bailee on his behalf, *Harbison vs. Proper*, 183 N. Y. S. 508. If the goods can readily be resold, for a reasonable price, and title has not passed, the seller must resell them and sue the buyer for the difference between the contract price and the resale price.

§ 256. **Where Contract Provides for Payment on a Day Certain, Irrespective of Delivery or Transfer of Title, Seller May Sue for Price Although Title Has Not Passed, Nor Goods Been Appropriated to Contract.** It is provided in Subd. 2, Sec. 144, *Pers. Prop. Law*, that where by the terms of the contract, the price is payable on a day certain, irrespective of delivery or of transfer of title, the seller may sue

for the price, although title has not passed nor the goods been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it. The contract of sale will rarely provide in terms that the price is to be paid on a day certain, whether delivery or transfer of title has been made. It may, however, happen in a particular case that the buyer promises to pay the price before acquiring the ownership or even the possession of the goods. In such a case, Subd. 2, Sec. 144, is applicable.

§ 257. Summarization of Seller's Action for the Price. "Under Sec. 144, Pers. Prop. Law, the seller may maintain an action against the buyer for the price in one of three cases only. Recovery is authorized in the first case where the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract; in the second case, where the price is payable on day certain, irrespective of delivery or of transfer of title, and the buyer has wrongfully refused or neglected to pay such price even though the property in the goods has not passed and the goods have not been appropriated to the contract; in the third case, where the buyer refuses to receive the goods on the seller's offer to deliver and the seller thereafter notifies the buyer that he holds the goods as bailee for the buyer, even though the property in the goods has not passed to the buyer, provided the goods cannot be resold for a reasonable price and provided further that the seller has no cause of action for damages for a refusal to accept delivery (*Economu vs. Schwartz*, 198 App. Div. 723)." Rippey, J., in *Hubbard vs. Rockaway Lunch Co. Inc.*, 131 Misc. 53.

§ 257. Buyer's Liability for Failing to Accept Delivery. It is provided in Sec. 132, Pers. Prop. Law, that "Where the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. If the neglect or refusal of the buyer to take delivery amounts to a repudiation or breach of the entire contract, the seller shall have the

rights against the goods and on the contract hereinafter provided in favor of the seller when the buyer is in default."

§ 259. **Seller's Action for Damages for Non-acceptance of the Goods.** "If the buyer without lawful excuse fails to accept goods which he agreed to buy, he is liable on ordinary principles of contract for this breach of obligation." Williston on Sales, Sec. 581. It is provided in Sec. 145, Pers. Prop. Law, that—

"1. Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance..

"2. The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

"3. Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

"4. If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing toward carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages."

If the contract is one for the manufacture of merchandise and is broken before manufacture, the measure is the contract price less cost of manufacture. *Todd vs. Gambel*, 148 N. Y. 382.

If the seller has to buy instead of manufacture, the measure of damage is the difference between what the merchandise would cost him, and the contract price. *Roehm vs. Horst*, 178 U. S. 1.

In an action for non-acceptance, the damages are the difference between the contract price and market value at the time the goods ought to have been accepted—not at some later time. *Bonyng vs. Carey Co.*, 188 N. Y. S. 751.

Ordinarily, in a f. o. b. contract, the measure of damage for a breach involving a refusal to accept is the difference between the contract price and market value at the time and place for delivery. *Orester vs. Dayton Rubber Co.*, 228 N. Y. 134.

Where the plaintiff upon the buyer's refusal to accept, resold the goods, it was proper to charge the jury that the price which the seller realized on the resale was some evidence of the market value, *Duncan vs. Wohl*, 201 App. Div. 737, provided the resale is at the time of the breach, *Waumbeck vs. Alfandri*, 196 App. Div. 64.

In a contract c. i. f. New York, "buyer to pay on presentation of documents," the seller's damages for non-acceptance is the difference between the contract price and market value at the time of the arrival of the goods in New York, and not at the time the documents were presented, at which time the goods were still on the high seas. *Ruttonjee vs. Frame*, 237 N. Y. 115.

The seller's damages for non-acceptance are the damages actually sustained, and he will not be allowed to retain a deposit, the forfeiture of which was provided for in the contract in case of the buyer's non-performance, if the seller's damages can be foreseen and ascertained and will amount to considerably less than the deposit. The provision in the contract for forfeiture of the deposit will be treated in such a case as a penalty. *Glass vs. Banca*, 122 Misc. 637. But the buyer's deposit is not recoverable where the seller's damages exceed its amount. *Horn vs. Schein*, 185 N. Y. S. 851.

CHAPTER XX.

REMEDIES OF THE BUYER.

§ 260. **Action for Converting or Detaining the Goods.** It is provided in Sec. 147, Pers. Prop. Law, that where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld. The ordinary measure of damages in case of conversion is the value of the goods at the time of the conversion, but when the goods fluctuate in value, as do stocks, the measure of damages is the highest market price during a time after the conversion reasonably sufficient to allow the owner to replace the goods. *Scott vs. Rogers*, 31 N. Y. 676; *Baker vs. Drake*, 53 N. Y. 211; *Wright vs. Bank of Metropolis*, 110 N. Y. 237.

§ 261. **Buyer's Action Against Seller for Failing to Deliver the Goods.** It is provided in Sec. 148, Pers. Prop. Law, that—

"1. Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for non-delivery.

"2. The measure of damages is the loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract.

"3. Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver."

The buyer suing to recover damages for failure to deliver cannot recover without proving an offer to perform on his part, or that he was able and willing to perform. *Phelan vs. Jones*, 114 N. Y. S. 9. Formal demand for the goods and tender of payment is unnecessary. Readiness and willingness to receive the goods and pay for them is sufficient. *Vail vs. Rice*, 5 N. Y. 155; *Mount vs. Lyon*, 49 N. Y. 552.

It is not essential that a buyer should buy goods in the market, after a failure of the seller to deliver, in order to obtain the damages actually suffered. *Saxe vs. Penokee Lumber Co.*, 159 N. Y. 371. The acceptance of part of the goods does not prevent an action for breach of contract in failing to deliver the balance. *Gilbert vs. Alton*, 88 App. Div. 62. Where a vendor is in possession of goods sold when notes given in payment mature or credit expires, he cannot be compelled to deliver until the goods are paid for, or the amount due is tendered, and he cannot be sued for breach of contract for refusal to deliver the goods. *Newman vs. United Distillers*, 175 N. Y. S. 176. If the seller fails to deliver the goods, the purchaser may, where he has paid the agreed price, recover the amount so paid, and if the goods are worth in the market in excess of that amount he may also recover such excess. *Ginsberg vs. Merwin*, 176 N. Y. S. 568.

The seller is excused from a breach of contract arising from failure to deliver when such failure is due to the acts of the buyer, or when a third person whose note was to be given for the purchase price becomes insolvent. *Vandegrift vs. Cowles Engineering Co.*, 161 N. Y. 435.

The ordinary rule is that the measure of damages is the difference between the contract price and the market value of the goods at the time and place of delivery. *Hutton vs. Tullis*, 93 Misc. 548. If there is no market price at the exact place of delivery, then the market price at the nearest market should be considered. *Fowler vs. Gress Mfg. Co.*, 94 Misc. 650. Where there are no sales of the article contracted to be sold on the day of delivery, reference may be had to sales made within a reasonable time before and after the day of delivery, to ascertain its value on the day of delivery. *Dana vs. Fiedler*, 12 N. Y. 40. Where the price at the time and place of delivery cannot be shown, prices for a brief period before and after and at other places not distant are competent to show the market price at the time and place of delivery. *Cahen vs. Platt*, 69 N. Y. 348. Where goods are deliverable during a season, the average market price during the season is the criterion, not the highest. *O'Gara vs. Ellsworth*, 85 App. Div. 216. Where goods contracted to be sold have no actual or market value at the time and place of delivery, generally the buyer can recover only nominal damages for failure to deliver. *Barnes vs. Brown*, 130 N. Y. 372. But it has been held that in an action for failure to deliver a motion picture film, made or controlled exclusively by the defendant, and for which there is no

market, the plaintiff may recover for expenses incurred in preparing to exhibit the picture, and for loss of profits on sub-contracts where such profits were contemplated by the parties. *Levison vs. Oes*, 162 N. Y. S. 1043. Prospective profits are not allowable as damages when they are not within the contemplation of both parties. *Stecker vs. Weaver Coal Co.*, 116 App. Div. 772. But where a seller has notice that the buyer has made a sub-contract for the sale of the goods, the buyer may recover as damages the profits he would have made upon the resale. *Messmore vs. New York Shot Co.*, 40 N. Y. 422; *Booth vs. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487. Where a failure to deliver machinery causes other machinery to lie idle, the buyer may recover as damages the rental value of the idle machinery during the period of idleness. *Griffin vs. Colver*, 16 N. Y. 489. For a failure to deliver brick to be used in the construction of a building, the seller is liable to the buyer for wages paid by the buyer to workmen while idle and waiting for brick; but not for a proportionate amount of taxes on the property while work was delayed, nor for interest on the value of the property during that time. *Raymore Realty Co. vs. Pfoth-haver-Nesbit Co.*, 145 App. Div. 163. Where the seller fails to deliver goods on time, it is the duty of the buyer to reduce the damages as much as possible by procuring other goods as soon as possible. *Parsons vs. Sutton*, 66 N. Y. 92.

§ 262. **Buyer's Right to Rescind the Contract.** The buyer has the right to rescind the contract of sale in the following instances:

(a) where he was induced to enter into the contract by the fraud of the seller;

(b) where he was induced to enter into the contract by mutual mistake as to identity or existence of the subject-matter;

(c) where he was induced to enter into the contract by a mistake on his part induced by the fraud of the seller;

(d) where he was coerced into the contract by legal duress;

(e) where the contract of sale was illegal, still executory and he is not in *pari delicto* with the seller;

(f) where the parties purport to sell specific goods and the goods without the knowledge of the seller have perished in part or have wholly or in a material part so deteriorated in quality as to be substantially changed in character; (Subd. 2, Sec. 88, Pers. Prop. Law);

(g) where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault of the seller or the buyer, part of the goods perish or the whole or a material part of the goods so deteriorate in quality as to be substantially changed in character; (Subd. 2, Sec. 89, Pers. Prop. Law)

(h) where the seller has repudiated the contract;

(i) where there is a breach of an express or implied warranty.

It is provided in Subd. 2, Sec. 88, Pers. Prop. Law, that "Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have perished in part or have wholly or in a material part so deteriorated in quality as to be substantially changed in character, the buyer may at his option treat the sale (a) as avoided, or (b) as transferring the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the sale was indivisible, or to pay the agreed price for the goods in which the property passes if the sale was divisible."

It is provided in Sec. 89, Pers. Prop. Law, that—

"1. Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault on the part of the seller or the buyer, the goods wholly perish, the contract is thereby avoided.

"2. Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault of the seller or the buyer, part of the goods perish or the whole or a material part of the goods so deteriorate in quality as to be substantially changed in character, the buyer may at his option treat the contract (a) as avoided, or (b) as binding the seller to transfer the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the contract was indivisible, or to pay the agreed price for so much of the goods as the seller, by the buyer's option, is bound to transfer if the contract was divisible."

In *Stone vs. Frost*, 61 N. Y. 614, there was a sale of grape roots, for which the buyer paid the purchase price. When the goods were delivered, they were found to be dead and worthless, and the buyer tendered them back. On that showing he was allowed to recover the purchase price paid.

In *Dexter vs. Norton*, 47 N. Y. 62, it was held that

where a contract was made for the sale of specific bales of cotton, which were destroyed by accidental fire before title had passed to the buyer, the seller was not liable to the buyer for damages for non-delivery.

If the seller wholly fails to deliver the goods, due to their destruction before the property has passed, the buyer may recover back any portion of the purchase price paid. *Joyce vs. Adams*, 8 N. Y. 291.

If the failure of the seller to deliver be wrongful, the buyer may recover part payments made. *Plumb vs. Bridge*, 142 App. Div. 154.

Where goods are confiscated because of the seller's failure to pay customs duties upon them, the buyer may rescind the sale and recover the purchase price which he has advanced. *Hamrah vs. Maloof*, 127 App. Div. 331.

The purchaser may recover the amount he has paid on partial delivery, after he has rescinded the contract for failure to complete delivery of the goods. *Kouloris vs. Cohen*, 131 Misc. 407. The purchaser cannot recover damages for the seller's failure to deliver goods, when he has rescinded the contract for such failure. *Kouloris vs. Cohen*, 131 Misc. 407.

A buyer is not bound to accept a partial delivery under an entire contract. *Kirsh & Co. vs. Roulston*, 178 N. Y. S. 246.

Where buyer has paid the full contract price for deliveries made and seller fails to perform, the buyer is entitled to recover back the difference between contract price and value of the goods accepted. *Guaranty Trust Co. vs. Gerseta Corp.*, 212 App. Div. 76.

Although buyer, under a divisible contract, has accepted a part delivery, he may reject the balance on the ground that they are of inferior quality. *Commercial Ribbon Co. vs. Elbee Co.*, 193 N. Y. S. 510.

Under a divisible contract, the buyer may reject that portion of the goods which is not in accordance with the contract and retain the balance. *Portfolio vs. Rubin*, 233 N. Y. 439.

Where the seller failed to remove defective goods as he had agreed to do, the buyer need not store them as seller's bailee, but may sell them at public auction. *Cook vs. Lipton*, 182 App. Div. 858.

Where instalment deliveries are made of defective goods, the buyer may reject them and recover damages as to those

instalments that he had used before discovering the defect. *Baxter vs. Savoy Shirt Co.*, 238 N. Y. 106.

The buyer need not accept overdue instalments. *Herx vs. Carlson*, 210 App. Div. 417.

Where the seller is required to deliver at a fixed time, or where no time is fixed, within a reasonable time after the making of the contract, and fails to do so, the buyer may rescind. *Taylor vs. Goelet*, 208 N. Y. 253.

Where seller fails to perform at contract time, buyer may rescind without notice. *Marks vs. Strook*, 203 N. Y. S. 112.

Ordinarily, acceptance of the goods by the buyer after expiration of the contract time, does not bar his action for damages for delay. *Crocker vs. Varick Co.*, 104 App. Div. 568.

The seller's refusal to deliver is an anticipatory breach and may be treated as an abandonment of the contract, entitling the buyer to sue, even before the time for performance has expired, for all his existing and prospective damages. *Windmuller vs. Pope*, 107 N. Y. 674; *Pakas vs. Hollingshead*, 184 N. Y. 211.

An action for money had and received is available to the vendee of chattels to recover sums paid pursuant to the sale contract, where there is a total failure by the vendor to perform. *Rosenwasser vs. Blyn Shoes, Inc.*, 246 N. Y. 340.

To authorize the vendee to rescind the contract and recover the price, the default of the vendor must be such that it destroys the essential objects of the contract. *Rosenwasser vs. Blyn Shoes, Inc.*, 246 N. Y., 340. Therefore, rescission by the vendee and recovery of moneys paid may not be had, where the vendor's default was in respect to a contract provision which was merely subsidiary, and which did not go to the entire consideration.

§ 263. **Buyer's Right to Specific Performance.** It is provided in Sec. 149, Pers. Prop. Law, that "where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just."

The End.

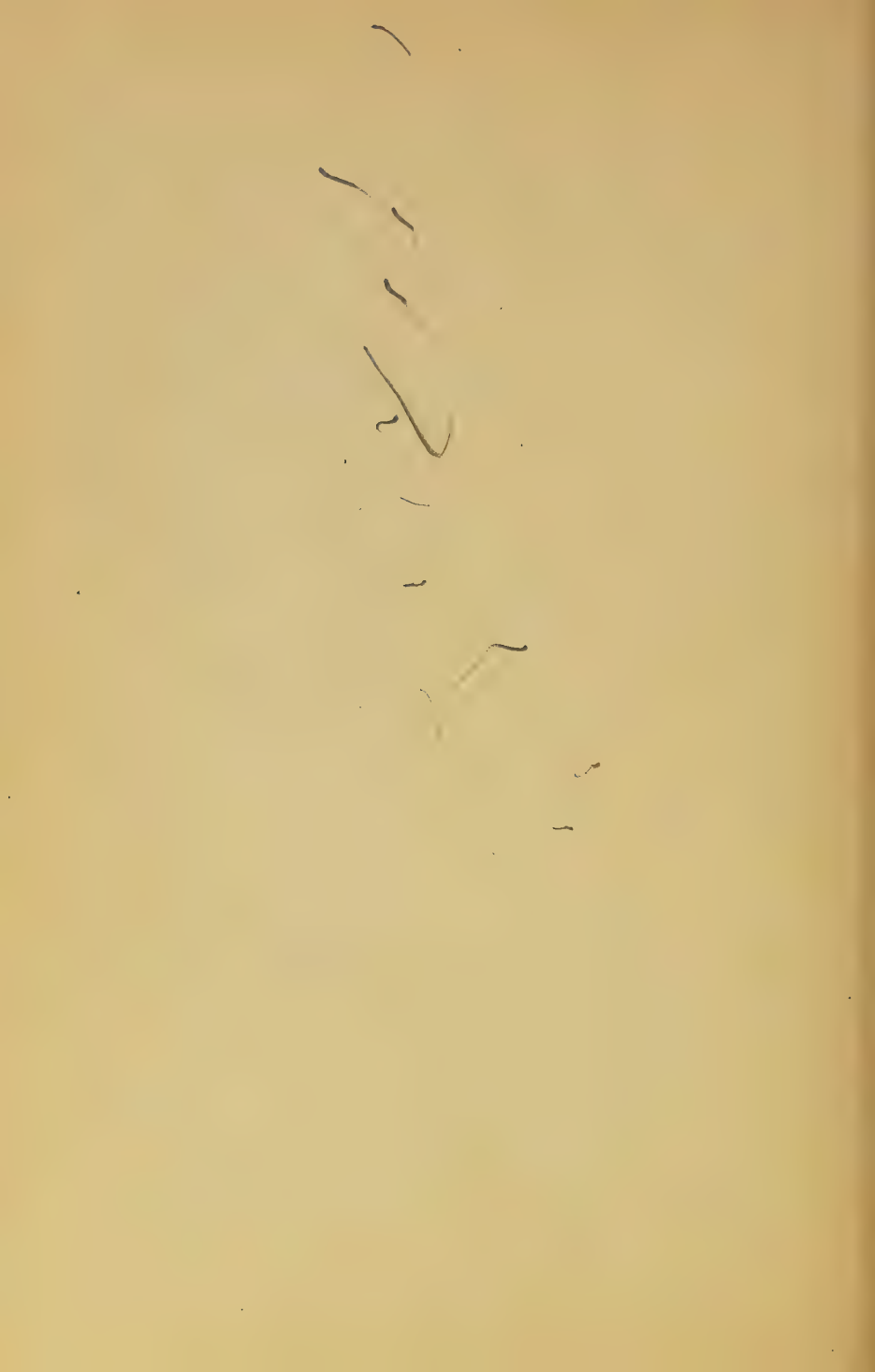
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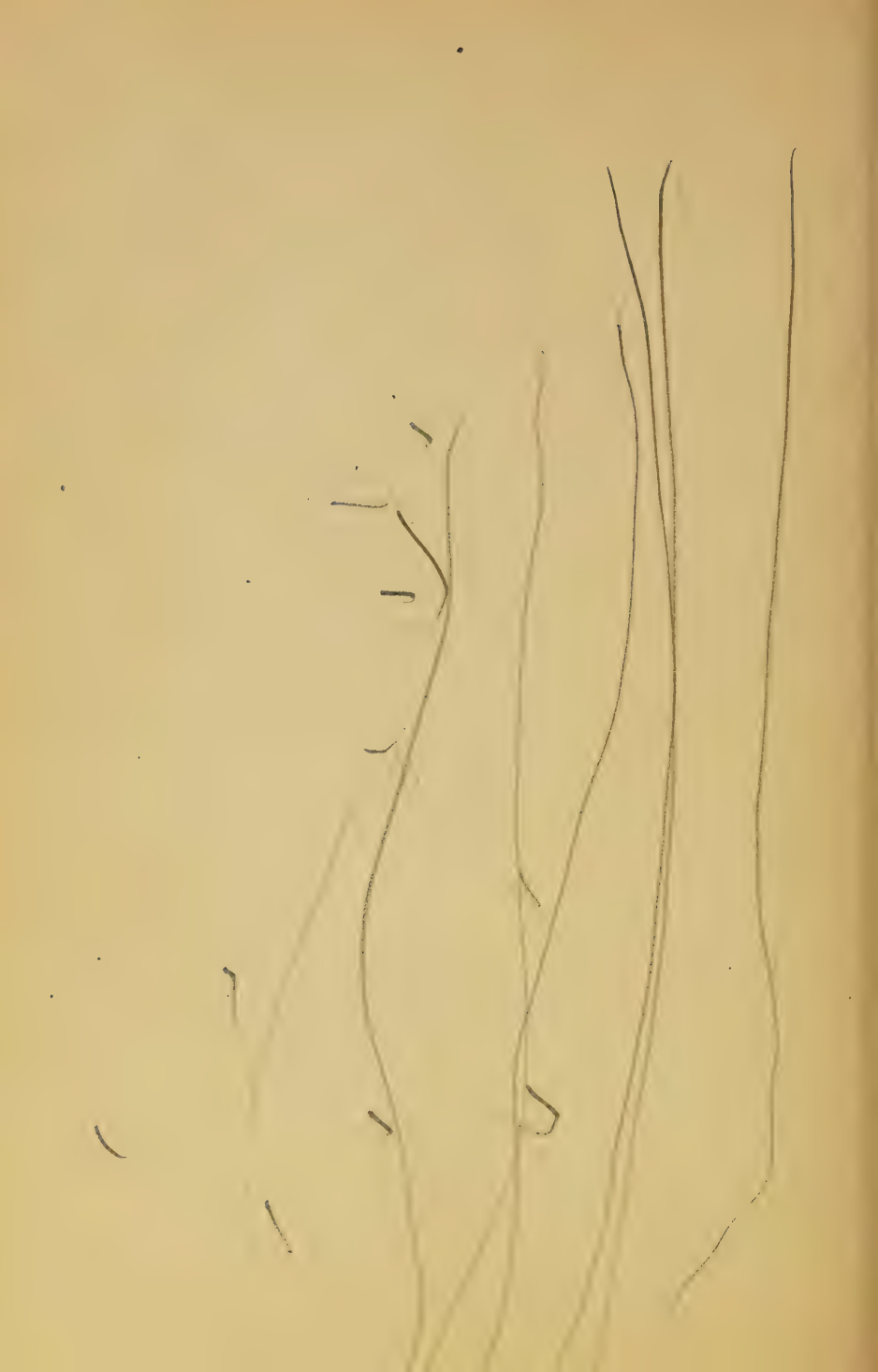
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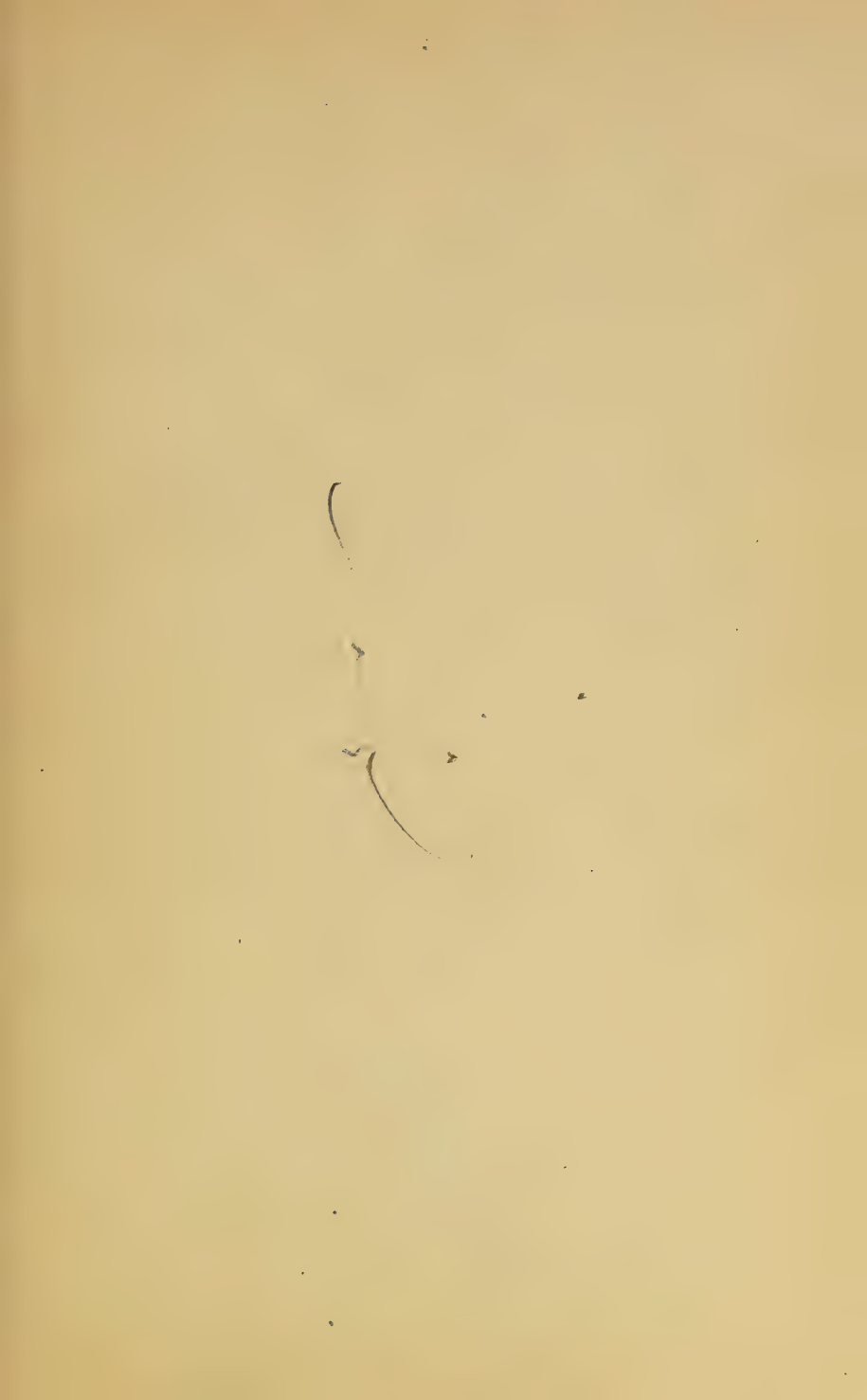
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Dolphus of Antares.
Rowell. America
La Guardia N. Y.
W. Robinson

Faulstich Jr. - Hollywood
Henry Hull in Broadway
King Albert - Belgium (died) (killed)

and Sas Ranga Case again

(247 1137)

